

On December 18, 2002, Mr. Kleinsmith faxed a "Response to Appointment of Counsel" (12/18/02 Response) to the District Court:

Philip M. Kleinsmith responds to his appointment of counsel herein by stating that his office received this order by fax at 10:46 a.m. on December 18, 2002. It was given to him at about 12:30 p.m. Mr. Kleinsmith spent the entire day yesterday in a hearing and has spent all day today attending to matters for which clients have paid him. No other time is available before he leaves on a planned vacation (12/19/02 thru 12/24/02) early in the morning on 12/19/02, Mr. Kleinsmith requests the Court to appoint someone else. (App. 4, 41, 57).

The deputy clerk testified that when the 12/18/02 Response was filed the docket clerk did not call its request to appoint a substitute attorney to the District Court because:

"... they are not taught to send up responses, that's considered something the judge would not see, they send up motions." (App. 63).

The deputy clerk refused to answer questions aimed at soliciting from her that:

"... this whole thing came about because an improper label was affixed to something."

"And because of a label, motion to appoint someone ... was not used that has precipitated this course of events. Is that correct?" (App. 63).

The "improper label" was "Response" (i.e., 12/18/02 Response) which contained a request to substitute another attorney rather than a "Motion to Substitute." The obvious

factual implication is that requests to substitute were routinely granted which would have avoided the entire contempt proceeding.

Mr. Kleinsmith left for his scheduled vacation without obtaining an order relieving him of his responsibility to contact the child. He believed he would be relieved of his duties as appointed attorney. This belief persisted until January 22, 2003 when the 1/22/03 Show Cause Order issued.

During the week of December 30, 2002, Gerard Bitsilly, the child's caseworker at the residential treatment program to which the child had been admitted, telephoned the District Court and informed the deputy clerk that the child wanted to speak with her attorney. The deputy clerk gave Mr. Bitsilly Mr. Kleinsmith's name and telephone number. Mr. Bitsilly attempted to contact him, leaving several messages asking him to telephone Mr. Bitsilly. He did not return Mr. Bitsilly's phone calls. (App. 4, 59, 60).

Mr. Kleinsmith denied that Mr. Bitsilly had ever called him. (App. 69).

On January 13, 2003, Mr. Bitsilly telephoned the District Court advising the deputy clerk that Mr. Kleinsmith had not contacted the child and that the child was demanding to speak with an attorney. The deputy clerk prepared an order reciting that Mr. Kleinsmith "was appointed by this Court on December 18, 2002, and counsel has failed to contact the child." The court order appointed another attorney to represent the child. This order ("1/13/03 Order Substituting Attorney") was signed by a District Court judge and entered later on January 13, 2003. On January 22, 2003, the District Court issued an order to show cause ("1/22/03 Show Cause Order") why Mr. Kleinsmith should

not be held in contempt of court for noncompliance with the 12/18/02 Order. (App. 5, 60, 61).

On January 29, 2003, Mr. Kleinsmith mailed a petition for writ of prohibition and stay to the New Mexico Supreme Court. (App. 31-46). Mr. Kleinsmith argued that the District Court's 10/28/02 Order was in substance a local rule and that it was invalid because it had not been submitted to the New Mexico Supreme Court for approval and because it usurped the Supreme Court's authority to regulate the practice of law. He also argued that the District Court had subjected him to involuntary servitude in violation of the Thirteenth Amendment by appointing him to represent the child. He asked the Supreme Court to declare the District Court's 10/28/02 Order, 12/18/02 Order and the 1/22/03 Show Cause Order void ab initio and to stay further proceedings in the District Court. The Supreme Court denied the petition without explanation on February 10, 2003. (App. 5, 31-46).

In addition to the Petition for Writ of Prohibition (App. 31-46), Mr. Kleinsmith filed a Response ("1/29/03 Response") to the 1/22/03 Show Cause Order. The 1/29/03 Response attached and incorporated the Petition for Writ of Prohibition. The 1/29/03 Response asked Judge Rich to disqualify himself. Consequently, on 1/29/03 three constitutional issues were before the District Court: New Mexico Constitutionality, involuntary servitude and disqualification of Judge Rich.

At the March 23, 2003 hearing ("3/23/03 Hearing") in his opening statement, Mr. Kleinsmith stated the three already stated grounds why the proceedings were unconstitutional and added that the proceedings were also unconstitutional because the 10/28/02 Order, 12/18/02

Order and the 1/22/03 Show Cause Order violated the Federal Constitutions: equal protection right, interstate commerce right, and; privileges and immunities right. He also stated that his alleged contempt was unintentional and impossible to perform because of geography and his lack of competency in mental health matters. Judge Rich did not rule on these issues. (App. 51-53).

At the conclusion of the hearing Judge Rich did not permit argument, but, in lieu thereof, ordered each side to submit proposed Findings of Fact and Conclusions of Law. (App. 70). Each party did this. (App. 72-90). In his Findings of Fact, Mr. Kleinsmith argued that the 10/28/02 Order and the 12/18/02 Order were unconstitutional for the reasons already stated. (App. 72-84).

On April 15, 2003, Judge Rich entered his Court's Findings of Fact and Conclusions of Law. (App. 22-26). It did not address any of the issues raised by Mr. Kleinsmith and adjudged him in contempt.

On May 13, 2003, Mr. Kleinsmith appealed to the New Mexico Court of Appeals. In his Opening Brief (App. 99-121), he argued all of the issues he had raised before the District Court and the Collateral Bar Rule because that Court had so ordered. On February 4, 2005, the New Mexico Court of Appeals by its Memorandum Opinion ("2/4/05 Memorandum Opinion") ruled that: Mr. Kleinsmith had a duty of continuing representation which he had breached; Judge Rich was impartial; Mr. Kleinsmith could not violate and simultaneously attack 12/18/02 Order, i.e., collateral estoppel, and; Mr. Kleinsmith could not raise his Federal constitutional issues because he "failed to raise these issues in the district court." (App. 13-19).

On February 14, 2005, Mr. Kleinsmith petitioned the New Mexico Supreme Court for certiorari raising the same issues he raised in the New Mexico Court of Appeals. (App. 91-122). On April 5, 2005, a Writ of Certiorari was issued. (App. 27). On July 5, 2005, the New Mexico Supreme Court quashed its Writ of Certiorari and ordered the New Mexico Court of Appeals to convert its 2/4/05 Memorandum Opinion to a published opinion. (App. 29).

On September 9, 2005, the New Mexico Court of Appeals entered a new Opinion ("9/9/05 Opinion"), specifically withdrawing its 2/4/05 Memorandum Opinion. (App. 1-12, p. 1). It abandoned the continuing representation basis of its 2/4/05 Memorandum Opinion. It changed its grounds for not addressing Mr. Kleinsmith's constitutional issues from "failure to raise them" to the Collateral Estoppel Rule and NMSA 32A-6-1ff. (App. 2, 6, 7). It expanded its discussion of the Contempt (App. 7-12) to include whether contempt must be initiated by a sworn pleading, whether Judge Rich was impartial, whether a face-to-face interview was necessary and that Mr. Kleinsmith willfully failed to perform his appointed duties. The 9/9/05 Opinion did not change the judgment of the 2/4/05 Memorandum Opinion.

E. ARGUMENT

1. First Question

NMSA 32A-6-12G specifically states that when certain pre-conditions are met (conceded to have occurred here) "the court shall appoint an attorney" for the child who is in residential mental treatment. The District Court's 10/28/02 Order specifically states that:

"... in all cases where appointment of counsel is deemed necessary by the court, an order of appointment form will be sent by the court to clerk of the court." (App. 39).

It is conceded that Mr. Kleinsmith was appointed by the District Court pursuant to this statute and this 10/28/02 Order. Mr. Kleinsmith further concedes that on the face of this statute and this 10/28/02 Order *alone*, his appointment was legally justified.

2. Second Question

Mr. Kleinsmith argues that his appointment (12/18/05 Order) was not legally justified when analyzed in the light of Section 3, Article VI of the New Mexico Constitution and its progeny which render the appointment unconstitutional.

The referenced part of the New Mexico Constitution (See C above) states that only the New Mexico Supreme Court "shall have a superintending control over inferior courts." To implement this exclusive power, the New Mexico Supreme Court has enacted the rule quoted in D above.

To further implement its exclusive power to control the New Mexico inferior courts, the New Mexico Supreme Court has enacted many other rules (See New Mexico Rules (NM Rules) in Westlaw). One set of such rules are the Rules of Professional Conduct, also enacted by most other states. Some of those rules are:

"... A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness

and preparation reasonably necessary for the representation." (NMRA 16-101)

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (NMRA 16-104B)

"A lawyer should *aspire* to render at least fifty (50) hours of *pro bono publico* legal services per year . . ." (NMRA 16-601)

"A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

A. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

B. representing the client is likely to result in an unreasonable financial burden on the lawyer, or

C. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." (NMRA 16-602)

After being appointed to represent a child in residential mental treatment, the attorney must perform the duties quoted in D above.

The statute (NMSA 32A-6-12G) authorizing appointment of an attorney does not prescribe whether or not the appointment can be forced upon an attorney who refuses the appointment, be he reasonably or unreasonably compensated, or not compensated at all. It does not state that the attorney be reasonably skilled in mental health matters, although this must be presumed. It does not state

any qualifications or conditions of the appointed attorney. The 10/28/02 Order also authorizes appointments and only prescribes that the appointment is *pro bono*.

The undisputed evidence is that Mr. Kleinsmith: did not consent to his appointment by the District Court; he was without any training or skills in mental health matters, and; would have had to travel over 600 miles (round trip) and spend about two days to have a face-to-face meeting with his child client (See B above).¹ Consequently, if Mr. Kleinsmith's appointment is assumed valid, he should not have been appointed because he did not consent thereto and was not qualified to serve according to the rules of the New Mexico Supreme Court cited above.

Mr. Kleinsmith further argues that, although the New Mexico Court of Appeals correctly concluded that NMSA 32A-6-12G authorizes attorney appointments, it incorrectly implicitly ruled that such appointments can be made against the will of the attorney. (App. 3). The plain language of that statute does not necessarily mean that. A fairer interpretation thereof would be that it contemplates voluntary appointees qualified in mental health matters. The point is that the conclusion that NMSA 32A-6-12G authorizes compelled attorney appointments is not justified.²

¹ The 9/9/05 Opinion (App. 10) makes a ruling that face-to-face meetings are not necessary. This seems contradictory to the common sense judgment that whether a child truly understands his rights requires a face-to-face meeting.

² Such a conclusion is also unconstitutional for the reasons argued herein.

The only clear authority for compelled attorney appointments is the District Court's 10/28/02 Order.²

Before embarking on this analysis, a preliminary issue must be disposed of, to-wit: Is the 10/28/02 Order a Rule? Rule 1-083B quickly answers "no." Specifically, it refuses to allow the New Mexico Supreme Court's exclusive rule-making power to be evaded by labelling unapproved rules as "administrative" or "order" rather than "rule." Rule 1-083B goes to the substance, rather than rubric of the matter by stating that a rule is something that governs "suits of a civil nature." The 10/28/02 Order does that. It is a rule.

By Section 3, Article VI of the New Mexico Constitution, only the New Mexico Supreme Court has the power to create "rules." It has chosen to enact many such rules but to allow inferior courts to adopt local rules consistent with New Mexico Supreme Court rules when the local rule is approved by and filed with the New Mexico Supreme Court and published. The obvious reason for publication is to inform as many people as possible of the rule.

On its face the 10/28/02 Order has not been approved and filed with the New Mexico Supreme Court nor published. Therefore, it is unconstitutional, void and cannot authorize what it states it does authorize: involuntary compelled appointments.

Mr. Kleinsmith's appointment was made pursuant to the void 10/28/02 Order. Therefore, his appointment and subsequent contempt proceeding are also unconstitutional and void. ~

² Such a conclusion is also unconstitutional for the reasons argued herein.

3. Third Question

(a) Involuntary Servitude

"... we hold that, . . . , the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by use or threat of physical restraint or physical injury or the use or threat of coercion through law or the legal process." *U.S. v. Kozminski*, 487 U.S. 931, 952 108 S. Ct. 2751, 2765, 101 L. Ed. 2d 788 (1988).

The same case states that there are exceptions to this rule:

"... the Thirteenth Amendment was not intended to apply to 'exceptional' cases well established in the common law at the time of the Thirteenth Amendment" "It is nonetheless significant that no reported decision exists in the above states (NM included) prior to 1892 holding that a lawyer could not decline representation without compensation . . . English precedents from the 15th to the late 19th century, on which the states apparently relied and which Congress might have had in mind, were equally murky . . . Again, no reported decisions involve the imposition of sanctions on lawyers unwilling to serve. See Shapiro, *Enigma of Lawyers Duty to Serve*, 55 NYU Law Review 735, 740."

"Professor Shapiro concludes: 'To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there. *ibid* at p. 753.'" (*Mallard v. U.S. Dist. Ct. for Southern Dist of Iowa*, 4990 U.S. 296, 303 ff, 109 S. Ct. 1814, 1819, 104 L. Ed. 2d 318 (1989)).

"In view of the complete absence of precedent evincing state courts' power to sanction attorneys unwilling to provide free representation, the dissents' surmise that congress meant to grant this power to federal judges, and, indeed, to confer on them as much authority as judges of the 'most progressive' states exercised, seems somewhat extravagant." (ibid p. 304, footnote 4).

In *Mallard*, Justice Brennan specifically ruled that he was not addressing whether any court had the inherent power to force attorneys to represent any litigant. He left that issue to another day. Nonetheless, his above analysis and conclusion that English and American courts did not have a firm tradition of coerced, uncompensated legal service before 1892 is strong evidence that such coerced legal services were not "exceptional" cases "well established in the common law at the time of the Thirteenth Amendment." (See *Kozminski* above).

Contrary to the fact that such forced legal services are not "an ancient and established tradition," Judge Rich's 10/28/02 Order so finds. (App. 38). With equal erroneousness, Judge Rich's Contempt Order concludes that the 10/28/02 Order was a valid court order for forced legal services by attorneys "to be appointed to pro bono cases" and that on that basis, Mr. Kleinsmith was appointed by Judge Rich's 12/18/02 Order. (App. 25). As has been demonstrated, the premise of Judge Rich's actions are false and unconstitutional.

The foregoing can be summarized as follows: whether court compelled involuntary legal services by attorneys is unconstitutional under the Thirteenth Amendment is unknown because this Court has never squarely ruled on the issue. Nonetheless, there are decisions of this Court

which indicate this Court would so rule. On that assumption, the 10/28/02 Order and NMSA 32A-6-12G's authorization (if so construed) of the same and all proceedings for contempt against Mr. Kleinsmith are unconstitutional.

(b) Federal Due Process

In *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 106 S. Ct. 1580, 1585, 89 L. Ed. 2d 823 (1986) it was ruled that a judge cannot preside in a case in which he has a personal interest.

"In *Tumey*, while recognizing that the Constitution does not reach every issue of judicial qualification, the Court concluded that 'it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal substantial, pecuniary interest in reaching a conclusion against him in his case.' 273 U.S., at 523, 47 S.Ct., at 441.

"More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome'. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision'. *Ibid*. Nonetheless, a reasonable formulation of the issue is whether the situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance

nice, clear and true." *Ward v. Village of Monroeville*, 409 U.S. 57, at 60, 93 S. Ct. 83 (op.cit., p. 1585).

Here, Judge Rich and his own 10/28/02 Order, 12/18/02 Order and his 1/22/03 Show Cause Order were at stake. Certainly, this would "tempt-him" "not to hold the balance nice, clear and true." This conclusion means that Judge Rich should have disqualified himself so that due process could be extended to Mr. Kleinsmith.

For criminal contempt, therefore, the burden of proof was "beyond a reasonable doubt."

The conclusion that Judge Rich should not have been "the judge in his own case" is further substantiated by other facts. His own clerk gave vital testimony about Mr. Kleinsmith's 12/18/02 Response which contained a request to substitute and did not get to Judge Rich because it had the wrong label. Judge Rich's Contempt Order specifically rules that the 12/18/02 Response "did not meet the Court's standards for withdrawal from a case." (App. 25). It is reasonable to conclude that this reflects that Judge Rich gave into the temptation to rule in favor of his clerk (over whom he has supervision) and, therefore, himself. Moreover, what "standards" are referenced? Further, one can reasonably conclude that more objective judge would have seen that the root cause of these proceedings was this misunderstanding about "labels," this "accident," and dismissed the proceeding rather than label Mr. Kleinsmith as a criminal contemnor.

The same is true, but in the opposite way with regard to Mr. Kleinsmith's testimony that between December 19, 2002 and January 22, 2003 he believed he had been

substituted for. In other words, Mr. Kleinsmith was the person who had allegedly offended Judge Rich. Common sense tells us that anyone who has been offended by a person and accuses that person thereof, is not likely to believe the offender's explanation. That is what Judge Rich did here: He simply refused to believe Mr. Kleinsmith.

The same is true in the "yea" and "nay" testimony of Mr. Bitsilly concerning his calls to Mr. Kleinsmith.

Finally, a more objective judge would have seen the high speed sequence of events here, to-wit:

10/28/02 Order;

12/18/02 Order;

12/18/02 phone conversation between court clerk and Mr. Kleinsmith;

12/18/02 Response;

12/19/02 departure of Mr. Kleinsmith on vacation to 12/26/02 with his belief he was substituted for;

Between 12/19/02 and 1/22/03 Mr. Kleinsmith persists in this belief;

On 1/22/03 the 1/22/03 Show Cause Order informs Mr. Kleinsmith that he has offended Judge Rich, but a substitute attorney is already appointed thereby depriving Mr. Kleinsmith of an opportunity to perform his duties;

This leaves Mr. Kleinsmith with no alternative, but to contest his alleged "accidental" contempt.

The most important fact in this fast sequence of events is that between 12/19/02 and 1/22/03 Mr. Kleinsmith believed the 12/18/02 Order was no longer in effect.

The conclusion of a more objective judge, especially under "proof beyond a reasonable doubt," could well have been that because Mr. Kleinsmith was not aware of his duties, he did not deliberately violate the 10/28/02 Order and the 12/18/02 Order. In other words, the whole affair was an "accident."

Certainly, all of this will be labeled speculation. This is true. Such labeling misses the inescapable point that it is reasonable to conclude that Judge Rich's mind was not "to hold the balance nice, clear and true." This is a denial of the fairness guaranteed Mr. Kleinsmith by due process.

(c) Equal Protection

This Court has ruled unconstitutional laws which treat unequally or differently persons of a certain trait with regard to rights when the trait is not suspect and the right is not fundamental (*Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) involving age/state judgeships; *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) involving redistricting; *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985), involving mental retardation/housing; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976), involving age/policeman's employment). Assuming these conditions, the question is: Is the discrimination rational? The rationality of the discrimination must not be perfect, but, it must have some rationality in both its *purpose and means* (*Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), *Schweiker v. Wilson*, 450 U.S. 221, 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981), *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101

S. Ct. 453, 66 L. Ed. 2d 368 (1980); *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 453, 59 L. Ed. 2d 171 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976)).

No judge would consider it to be within his power to order citizens within his jurisdiction to perform pro bono work for nothing, for below market wages, or, even, for full or above market wages. Whether for laudable or unlaudable reasons, for a judge to enter such an order is unthinkable. It clearly would be irrational because Americans have a basic property and liberty right to provide their labor and services only to those to whom they freely and voluntarily decide to provide them to, at a price they decide, not to whom or at a price decided by a judge.

The 10/28/02 Order speaks totally in terms of traditional pro bono work, not in terms of statutory appointments (as stated above those statutes do not mandate involuntary appointments). If lawyers are bound by traditional pro bono work (See above – they are not), the tradition violates equal protection. It is clear Judge Rich would not order his non-attorney citizens to do pro bono work. If he did, Judge Rich should know those citizens would be up-in-arms. They would consider such pro bono orders to be irrational and a violation of their sole right to do work for only other citizens that they choose.

The important fact for equal protection clause purposes is that the 10/28/02 Order rules that only attorneys must do pro bono work, not citizens with other professions or skills. Clearly, because there is no rational basis for this distinction, Judge Rich's 10/28/02 Order violates equal protection.

(d) Interstate Commerce

As articulated in *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1105ff (1997), the Commerce Clause provides limitations on the restrictions a state can impose on interstate commerce, which includes the practice of law. Here, the test is a balancing test between interstate or local interests and whether the state law is excessive. If the law is not neutral in effect, it is unconstitutional. When applied to an attorney like Mr. Kleinsmith who is engaged in interstate commerce, it is excessive and not neutral. If every district in the twenty-four states where Mr. Kleinsmith is licensed to practice law adopted its own "administrative order," Mr. Kleinsmith would be doing only pro bono work. If every county of every state adopted an "administrative order," the pro bono work imposed on Mr. Kleinsmith would require him to set up a non-profit law firm whose sole source of income would be Mr. Kleinsmith's personal funds. The Administrative Order is indisputably an excessive and non-neutral restriction of interstate commerce. It is unconstitutional.

(e) Privileges and Immunities

This Court has held that the purpose of the Privileges and Immunities Clause of the United States Constitution is to fuse into one Nation a collection of independent, sovereign States. It has also held that it protects only fundamental rights which includes the practice of law. Finally, it has held that it does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective, considering the availability of less restrictive means. (*Supreme Court*

of *New Hampshire v. Piper*, 470 U.S. 274, 279-289, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985)).

The argument under Privileges and Immunities is basically the same as the argument under the Interstate Commerce clause (See previous sub-section). In other words, even if it is assumed that legally every county in the land may adopt its own "administrative order" and that there is no difference in treatment between residents and non-residents, nonetheless, the discrimination against non-resident attorneys does not bear a substantial relationship to the county's objective, considering the availability of less restrictive means. Here, the less restrictive means must be the state's, including the county's, ability to tax and spread the burden amongst its citizens rather than to place an unreasonable burden on non-resident attorneys.

The 10/28/02 Order is too restrictive upon out-of-state attorneys. It is unconstitutional under the federal privileges and immunities clause.

4. Fourth Question

The New Mexico Court of Appeals 9/9/05 Opinion. (App. 6, 7) certainly says that the Collateral Bar Rule is a basis – if not the basis – for not addressing Mr. Klein-smith's constitutional issues:

"Because the district court was not proceeding in excess of its subject matter or personal jurisdiction in appointing Appellant to represent the child, the collateral bar rule precludes Appellant from challenging the validity of the underlying order of appointment." (App. 7).

The rule and its parameters are stated in the following New Mexico cases (*Maness v. Myers*, 419 U.S. 449, 458, 495 S. Ct. 584, 42 L. Ed. 2d 574 (1975) is in accord).

"Defendant either had to appeal, seek expedited judicial redress or accept the order of the court. He did not have the right simply to ignore the court's ruling; in effect, to become his own judge and jury. . . ."

"This affirmance should not, however, be misconstrued as granting undue judicial license in the area of contempt. Courts and commentators have questioned the outer limits of the collateral bar rule. For example, when fundamental constitutional liberties are subject to immediate and irreparable harm, or where alternative avenues of judicial redress are simply not available given the press of time, the collateral bar rule may have to yield. (*State v. Bailey*, 118 N.M. 466, 469, 882 P.2d 57, 60 (Ct. App 1994)."

"... the collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling; in the absence of such an opportunity for review, the [alleged] contemnor may challenge the validity of the disobeyed order 'on appeal'" (*In Re Novak*, 942 F. 2d 1397 (11th Cir 1991) quoted with approval in *Pina v. Espinoza*, 130 N.M. 661, 699, 29 P.3d 1062, 1070 (N.M. Ct. App. 2001).

In sum, the elements of the Collateral Bar Rule are:

- (1) A court order, valid or invalid;
- (2) Deliberate refusal to obey by a person subject to the order, except when:

- (a) fundamental constitutional liberties are subject to immediate and irreparable harm, or;
- (b) where alternative avenues of judicial redress are not available given the press of time.

Whether unconstitutional or not, it is obvious that court orders existed, to-wit: the 10/28/02 Order and based thereon, an order appointing Mr. Kleinsmith (12/18/02 Order).

With regard to the second element, a re-visiting of the argument in Federal Due Process above is necessary. There, it is pointed out that an objective judge, under proof "beyond a reasonable doubt," could reasonably find that between Mr. Kleinsmith's 12/18/02 Response requesting another attorney be appointed and January 22, 2003 when the District Court appointed another attorney, Mr. Kleinsmith reasonably believed he had been relieved of his duties under the 12/18/02 Order. If such a judge would have made such a finding, Mr. Kleinsmith did not deliberately violate the 12/18/02 Order. He believed it did not exist. Moreover, because, when Mr. Kleinsmith realized on January 22, 2003 that he was still subject to the 12/18/02 Order, he had no ability to comply with it because another attorney had been appointed by the 1/13/03 Order Substituting Attorney. In other words, Mr. Kleinsmith had no other avenue of judicial redress after the Petition for Writ of Prohibition was decided. His only redress was to litigate the contempt, as he has done. Mr. Kleinsmith did not deliberately refuse to obey a court order. Mr. Kleinsmith had no alternative avenues to his "accidental" contempt.

When these facts are mixed with the facts that Mr. Kleinsmith's "fundamental liberties" were "subject to immediate and irreparable harm," the first exception to the second element of Collateral Estoppel is fulfilled.

In sum, none of the elements of Collateral Estoppel are fulfilled. It does not apply.

F. Conclusion

The 10/28/02 Order, the 12/18/02 Order, and the entire contempt proceedings were unconstitutional. The Collateral Bar Rule is not applicable. The contempt orders should be reversed.

Respectfully submitted,

Petitioner

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All Proceedings Below:*

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APPENDIX

App. 1

**IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO**

Opinion Number _____

Filing Date: September 9, 2005

NO. 23,999

In the Matter of PHILIP M. KLEINSMITH,

Respondent-Appellant.

**APPEAL FROM THE DISTRICT COURT OF MCKINLEY
COUNTY**

Joseph L. Rich, District Judge

Phillip M. Kleinsmith
Kleinsmith & Associates, P.C.
Colorado Springs, CO

Pro se Appellant

Patricia A. Madrid
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Santa Fe, NM

for Appellee

OPINION

ALARID, Judge.

{1} The case is before us pursuant to an order of the New Mexico Supreme Court quashing the writ of certiorari previously issued to this Court on April 5, 2005, and remanding this matter to this Court with directions that we convert our Memorandum Opinion issued February 4, 2005, to a formal, published opinion. Accordingly, we hereby withdraw our February 4, 2005, Memorandum

Opinion and substitute the following formal opinion in its place.

(2) Respondent-Appellant, Philip M. Kleinsmith, appeals the district court's judgment finding him in contempt of court for violating an order appointing Appellant to represent a child pursuant to the Children's Mental Health and Disabilities Act. Appellant argues that the underlying district court order appointing him to represent the child *pro bono* is unconstitutional under various provisions of the United States and New Mexico Constitutions and that it usurps the New Mexico Supreme Court's authority to regulate the practice of law. Applying the collateral bar rule, we decline to address Appellant's challenges to the validity of the underlying order of appointment. Appellant also challenges the proceedings on the order to show cause why he should not be held in contempt, arguing that the order to show cause was defective and that he was denied an impartial judge. Finally, Appellant argues that he lacked the ability to comply with the order, or, alternatively, that he did not intentionally violate the order of appointment. We reject these claims of error on the merits. We affirm the judgment of the district court holding Appellant in contempt of court and fining him \$500.

BACKGROUND

(3) In October 2002, the district court entered an Administrative Order for the purpose of establishing an, effective and fair system for *pro bono* attorney appointments in McKinley County. The order required, *inter alia* that all lawyers who had appeared as counsel in three or more cases filed in McKinley County during the preceding

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twelve-month period would be eligible for *pro bono* appointment on a rotating basis.

{4} On December 16, 2002, a petition was filed with the district court pursuant to the Children's Mental Health and Developmental Disabilities Act, NMSA 1978, §§ 32A-6-1 to -22 (1995, as amended through 1999) (CMHDDA) seeking appointment of an attorney for a child who had been admitted to a residential mental health facility. The chief deputy clerk of the district court reviewed the petition and the *pro bono* appointment list, determining that pursuant to the Administrative Order, Appellant was the next attorney due for a *pro bono* appointment. The deputy clerk prepared an order appointing Appellant as attorney for the child. On December 18, 2002, a district judge signed the order. The order was filed and a copy of the order and petition for appointment of an attorney were faxed by the clerk's office to Appellant. The order provided as follows:

THIS MATTER having come before the Court upon the filing of Petition in the matter, and pursuant to Section 32A-6-12 G, NMSA 1978 (as amended) an attorney shall be appointed to represent the child in this matter.

IT IS THEREFORE ORDERED that **PHILLIP** [sic] **KLEINSMITH** an attorney licensed to practice law in the New Mexico Court[s] is hereby appointed to represent [] the child in this matter.

IT IS FURTHER ORDERED that **PHILLIP** [sic] **KLEINSMITH**; shall meet with the child pursuant to [s]ection 32A-6-12 I, and shall advise the Court of said meeting, pursuant to Section 32A-6-12 J, NMSA.

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{5} Within hours of receiving the faxed order and petition, Appellant telephoned the clerk's office. Appellant stated that he could not represent the child as he was going on vacation the next day, December 19, 2002, and would not return until December 26, 2002. The deputy clerk suggested that Appellant contact the mental health facility and speak to the child over the telephone. Appellant replied: "I don't even give service that fast on my paying clients." When Appellant persisted in asking to be relieved, the deputy clerk explained that she did not have the authority to relieve Appellant of his appointment and that Appellant should fax a motion to withdraw and a proposed order to the district court.

{6} On December 18, 2002, Appellant faxed a "Response to Appointment of Counsel" to the district court:

Philip M. Kleinsmith responds to his appointment of counsel herein by stating that his office received this order by fax at 10:46 a.m. on December 18, 2002. It was given to him at about 12:30 p.m. Mr. Kleinsmith spent the entire day yesterday in a hearing and has spent all day today attending to matters for which clients have paid him. No other time is available before he leaves on a planned vacation (12/19/02 thru 12/24/02) early in the morning on 12/19/02. Mr. Kleinsmith requests the Court to appoint someone else.

{7} Appellant left for his scheduled vacation without obtaining an order relieving him of his responsibility to contact the child. During the week of December 30, 2002, Genard Bitsilly, the child's caseworker at the residential treatment program to which the child had been admitted, telephoned the district court and informed the deputy

clerk that the child wanted to speak with her attorney. The deputy clerk gave Mr. Bitsilly Appellant's name and telephone number. Mr. Bitsilly attempted to contact Appellant, leaving several messages asking Appellant to telephone Mr. Bitsilly. Appellant did not return Mr. Bitsilly's phone calls.

(8) On January 13, 2003, Mr. Bitsilly telephoned the district court advising the deputy clerk that Appellant had not contacted the child and that the child was demanding to speak with an attorney. The deputy clerk prepared an order reciting that Appellant "was appointed by this Court on December 18, 2002, and counsel has failed to contact the child." The order appointed another attorney to represent the child. This order was signed by the district court judge and entered later on January 13, 2003. On January 22, 2003, the district court issued an order to show cause why Appellant should not be held in contempt of court for noncompliance with the December 18, 2002, order of appointment.

(9) On January 29, 2003, Appellant mailed a petition for writ of prohibition and stay to the New Mexico Supreme Court. Appellant argued that the district court's Administrative Order was in substance a local rule and that it was invalid because it had not been submitted to the Supreme Court for approval and because it usurped the Supreme Court's authority to regulate the practice of law. Appellant also argued that the district court had subjected him to involuntary servitude in violation of the Thirteenth Amendment by appointing him to represent the child. Appellant asked the Supreme Court to declare the district court's Administrative Order and the order to show cause void *ab initio* and to stay further proceedings in the

district court. The Supreme Court denied the petition without explanation on February 10, 2003.

(10) On March 19, 2003, the district court judge held a hearing on the order to show cause. The judge found Appellant in contempt of court and imposed a fine of \$500.

DISCUSSION

Collateral Bar Rule

(11) Generally, a party must obey an order issued by a court with subject matter and personal jurisdiction until the order is set aside. A party who disobeys an order may not collaterally attack the validity of the underlying order in the course of an appeal from a judgment holding the party in criminal contempt of court for violating the order. *State v. Cherryhomes*, 114 N.M. 495, 498, 840 P.2d 1261, 1264 (Ct. App. 1992). With strictly limited exceptions, *see, e.g., Maness v. Meyers*, 419 U.S. 449 (1975), these principles, known as the "collateral bar rule," apply even where the underlying order is unconstitutional. *Cherryhomes*, 114 N.M. at 498, 840 P.2d at 1264.

(12) District courts are courts of general jurisdiction. "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const art. VI, § 13. In entertaining the petition for appointment of an attorney, the district court was exercising jurisdiction conferred on district courts by the Children's Code. NMSA 1978, § 32A-1-4(C) (2003) (defining "court" to mean "the children's court division of the district court"); NMSA, § 32A-1-5(A) (1993) (establishing children's court as a division of the

district court of each county); NMSA 1978, § 32A-1-8(A) (1993) (conferring "exclusive original jurisdiction [in the children's court] of all proceedings under the Children's Code); § 32A-6-12(G) (requiring the court to appoint an attorney for a child voluntarily admitted to a residential treatment or habilitation program upon petition by the residential treatment or habilitation program). The district court clearly was acting within its subject matter jurisdiction in appointing an attorney to represent the child. Appellant has not challenged the personal jurisdiction of the district court. Because the district court was not proceeding in excess of its subject matter or personal jurisdiction in appointing Appellant to represent the child, the collateral bar rule precludes Appellant from challenging the validity of the underlying order of appointment.

Contempt Proceeding

(13) Appellant argues that the contempt proceedings were fatally defective because they were initiated by an unverified order to show cause. In *State v. Clark*, 56 NM. 123, 127, 241 P.2d 328, 330 (1952), the defendant was charged in an unverified motion with having violated an injunction prohibiting the defendant from operating houses of prostitution. The defendant was convicted. On appeal, the Supreme Court reversed, holding that a verified motion or affidavit was "a prerequisite to jurisdiction in the case."

(14) We consider the present case to be distinguishable from *Clark*, for the reasons announced in *In re Avallone*, 91 N.M. 777, 778, 581 P.2d 870, 871 (1978). In *In re Avallone*, the contemnor was appellate counsel for a defendant in a criminal case before this Court. The contemnor

committed numerous errors of omission in violation of the rules of appellate procedure:

(1) Appellant did not file a description of the parts of proceedings believed necessary for inclusion in the transcript or serve a copy of the same upon the appellee. (2) Appellant did not request a designation conference prior to filing the brief in chief. (3) Appellant did not file a designation of the transcript of proceedings or proof of satisfactory arrangements. (4) Appellant did not file a transcript of proceedings under the limited calendar requirements of the rules. (5) Appellant failed to provide references to the transcript or the record proper in the brief in chief.

91 N.M. at 777-78, 581 P.2d at 870-71 (citations omitted). Rather than dismiss the appeal, this Court issued an order to show cause why the defendant's counsel should not be held in contempt. At the show cause hearing, counsel argued that the proceedings should be dismissed because the contempt proceedings had not been initiated by a sworn pleading, or a pleading accompanied by a sworn affidavit. We rejected this contention and found counsel in contempt of court for failing to comply with the rules of appellate procedure. The Supreme Court affirmed our judgment of contempt. The Supreme Court stated that "[w]here the court's records show whether a fact of filing was or was not accomplished, it is not necessary to support a show cause order by affidavit." *Id.* at 778, 581 P.2d at 871.

(15) In the present case, the order appointing Appellant directed Appellant to meet with the child and to advise the district court of the meeting. The district court's records would have indicated the facts of Appellant's appointment,

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Appellant's request to be relieved, the absence of an order relieving Appellant of his appointment, and the absence of the written statement contemplated by Section 32A-6-12(J) (requiring attorney to prepare a written certification that the child understands his rights and desires to remain in the program and to forward a copy to the court within seven days of the child's admission). Here, the absence of the Section 32A-6-12(J) statement would have indicated to the district court that Appellant had not complied with the district court's order. In such a case, it was not necessary to support the order to show cause with a sworn affidavit.

[16] Citing *Wollen v. State*, 86 N.M. 1, 2, 518 P.2d 960, 961 (1974), Appellant contends that the district judge was required to disqualify himself *Wollen*, which adopted a per se rule of disqualification, was overruled by *State v. Stout*, 100 N.M. 472, 672 P.2d 645 (1983). Under *Stout*, a judge who initiates a contempt proceeding may preside at the show cause hearing so long as he has not become so embroiled in the controversy that he is unable to fairly and objectively decide the matter. *Id.* at 475, 672 P.2d at 648. Here, the district court judge was not subjected to a personal attack; his only demonstrable interest was in vindicating the authority of the court. We have listened to the tape-recorded transcript of the hearing on the order to show cause and we are satisfied that any irritation the judge may have felt upon learning that his order had been ignored by Appellant did not interfere with his ability to conduct the show cause hearing in a dignified, temperate, and impartial manner. The district court judge did not err in declining to disqualify himself.

[17] Lastly, Appellant argues that the record does not demonstrate that he committed contempt because he

lacked the ability to carry out the district court's order and because he did not intentionally violate the district court's order.

(18) The district court heard testimony that, although a face-to-face meeting is preferred, Appellant could have interviewed the child by telephone to carry out his responsibilities under Section 32A-6-12(I). While we encourage attorneys appointed to represent children pursuant to the CMHDDA to meet with their clients in person, we acknowledge, consistent with the testimony presented to the district court, that in the case of attorneys who are contacted on short notice and who live a considerable distance from the facility in which the child has been placed, that contact by telephone is a reasonable method of complying with the duties imposed by Section 32A-6-12.¹ The record supports the conclusion that Appellant had the ability to substantially carry out the terms of the order appointing him without even leaving his own office, but instead flatly refused to even consider this alternative method of complying with the court's order.

(19) At the show cause hearing, Appellant had a full and fair opportunity to explain his failure to obey the order of appointment. Appellant's excuse was that he assumed when he did not hear back from the district court that the district court had automatically granted his request to be

¹ Section 32A-6-12(I), which was cited in the order appointing Appellant, sets out the initial duties of an attorney appointed to represent a child who has been voluntarily admitted to a residential mental health program:

Within seven days of the admission, an attorney representing the child pursuant to the provisions of the Children's Mental Health and Developmental Disabilities Act . . . shall meet with the child.

relieved and had appointed another member of the bar to fulfill Appellant's duties to the child. We reject Appellant's attempt to shift the burden of notification to the district court. Appellant does not dispute that he had actual notice of the order appointing him to represent the child. Pursuant to Rule 10-113(B) NMRA, an attorney appointed by the court to represent a child "shall continue such representation until relieved by the court." Notwithstanding his pending request to be relieved, Appellant remained subject to the duty to carry out the district court's order of appointment unless and until he was notified by the district court that Appellant's request to be relieved had been granted.

(20) The district court's findings indicate that the court disbelieved Appellant, who denied receiving phone messages from Mr. Bitsilly, and instead, the court believed Mr. Bitsilly, who testified that during the week of December 30, 2002, he left several messages at Appellant's phone number asking Appellant to phone him. During the same period that Appellant was receiving phone messages from Mr. Bitsilly, Appellant necessarily knew that he had not received a written order or other communication from the district court granting his request that the district court appoint someone else. Appellant compounded his initial contempt in leaving on vacation without contacting the child when, following his return from vacation, he repeatedly ignored phone calls from Mr. Bitsilly, knowing that he had not received a written order or other communication from the district court relieving him of the appointment. Under New Mexico law, intent is not an essential element of either civil or criminal contempt. *Seven Rivers Farm, Inc. v. Reynolds*, 84 N.M. 789, 792, 508 P.2d 1276, 1279 (1973). Appellant's willful indifference to the status of his

appointment as demonstrated by his failure to contact the district court subsequent to the filing of his December 18, 2002, response, coupled with Appellant's failure to carry out his appointment, fully justified the district court's finding of contempt. *See In re Avallone*, 91 N.M. at 778, 581 P.2d at 871 (upholding finding of contempt based upon evidence of counsel's unexcused failure to comply with the rules of appellate procedure).

CONCLUSION

{21} We affirm the judgment of the district court finding Appellant in criminal contempt and fining Appellant \$500.

{22} **IT IS SO ORDERED.**

/s/ A. Joseph Alarid

A. JOSEPH ALARID, Judge

WE CONCUR:

/s/ Michael Bustamante

MICHAEL D. BUSTAMANTE, Chief Judge

/s/ Ira Robinson

IRA ROBINSON, Judge

**IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO**

In the matter of **PHILIP M. KLEINSMITH,**

Respondent-Appellant.

No. 23,999

**APPEAL FROM THE DISTRICT COURT OF
MCKINLEY COUNTY**

Joseph L. Rich, District Judge

Philip M. Kleinsmith

KLEINSMITH AND ASSOCIATES, P.C.

Colorado Springs, Colorado Pro Se Attorney-Appellant

Patricia A. Madrid

Attorney General

Frank D. Weissbarth

Assistant Attorney General

Santa Fe, New Mexico

Attorneys for Petitioner-Appellee

MEMORANDUM OPINION

ROBINSON, Judge.

Philip M. Kleinsmith (Appellant) appeals the district court order finding him in contempt of court for violating the court's order appointing him to represent a child. Appellant argues that the court's administrative order, which prescribes *pro bono* appointments of counsel, is unconstitutional under the Thirteenth and Fourteenth Amendments, Interstate Commerce and Privileges and Immunities Clauses to the U.S. Constitution, and Article VI, Section 3 of the New Mexico Constitution, and also violates the New Mexico Supreme Court Rules for Admission to the Bar and Disciplinary Rules and the New Mexico Rules of Professional Conduct. Appellant also

contends that the Collateral Bar Rule does not preclude him from challenging the court's administrative order, and that he cannot be held in contempt because the issuing judge did not recuse himself from the show cause hearing. We are not persuaded by these arguments and therefore affirm.

BACKGROUND

On October 28, 2002, the Eleventh District Court entered an administrative order that all lawyers licensed to practice law in New Mexico who have been listed as counsel in three or more cases in McKinley County within a twelve-month period, must participate in the court's program of appointments in *pro bono* cases. On December 16, 2002, a mental health program petition was filed in the Eleventh Judicial District seeking an appointment of an attorney for a minor child, who had been admitted for psychiatric treatment at Rehoboth McKinley Christian Health Care Services (RMCH). Pursuant to the administrative order, it was determined that Appellant had entered his appearance as counsel on at least three cases in McKinley County in the prior twelve months, and was a member of the bar in the State of New Mexico. Following the receipt of the petition, the court's chief deputy clerk reviewed the court's appointment list and saw that Appellant was the next attorney on the rotation to receive a court appointment. On December 18, 2002, Judge Rich signed and entered an order appointing Appellant to represent the child, which was faxed to Appellant. The next day, Appellant telephoned the chief deputy clerk and explained that he could not represent the child because he was going on vacation the following day. The clerk explained that she did not have the authority to relieve him

of the appointment, and suggested that he file a motion and proposed order to withdraw. Appellant then faxed a document entitled "Response to Appointment of Counsel" to the court. During the week of December 30, 2002, the clerk received a phone call from Genard Bitsely, a representative of RMCH, explaining that the child wanted to know who her attorney was and wanted to speak with him. The court clerk gave Bitsely the name and number of Appellant. Bitsely attempted to contact Appellant several times and left his number, but never received a return from him. Bitsely contacted the court clerk, stating that the child wanted to speak with an attorney. On January 13, 2003, Judge Rich appointed another attorney to represent the child. On January 22, 2003, the district court issued a show cause order to determine why Appellant should not be held in contempt of court for failure to meet with the child as previously ordered by the court. Judge Rich conducted a show cause hearing and found Appellant in contempt of court and imposed a fine of \$500.

DISCUSSION

1. Duty to Provide Representation

"The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const. art. VI, § 13. Accordingly, under the Children's Mental Health and Developmental Disabilities Act, NMSA 1978, §§ 32A-6-1 to -22 (1995, as amended through 1999), "the residential treatment or habilitation program shall . . . petition the court to appoint an attorney [and] [w]hen the court receives the petition, the court shall appoint an attorney." § 32A-6-12(G).

Furthermore, pursuant to the Rules of Professional Responsibility, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Rule 16-116(C) NMRA 2004. "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests." Rule 16-116(D).

Our Supreme Court in *In re Romero* recognized that

Rule 16-103 requires a lawyer to act with reasonable diligence and promptness in representing a client. Rule 16-104 requires a lawyer to keep a client reasonably informed about the status of a matter, to promptly comply with reasonable requests for information, and to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation.

2001-NMSC-008, ¶ 7, 130 N.M. 190, 22 P.3d 215 (per curiam). Under Rule 10-113B(B) and (C) NMRA 2004, "[a]n attorney . . . who has been appointed by the court to represent a party in any children's court proceeding shall continue such representation until relieved by the court, . . . may [not] withdraw as counsel without a written order of the court."

After review of the record, there is no indication that Appellant was relieved of his appointment by the district court. Simply abandoning such an appointment after filing a "Response to Appointment of Counsel" without a written order relieving him of the appointment does not negate or suspend Appellant's duty of representation. Thus, under the Rules of Professional Conduct, once the Appellant was notified of his appointment, he had a duty to represent the child with reasonable diligence, and to keep the child

informed of matters until relieved from such an appointment by the district court. Instead, Appellant went on vacation and failed to contact the child or RMCH. Of equal concern, Appellant failed to check with the district court concerning the status of his appointment.

We recognize that under Rule 16-602 NMRA and under the Children's Mental Health and Developmental Disabilities Act, the district courts have the authority to make such appointments. *Supra*. Therefore, since Appellant was not relieved of the district court's appointment and failed to comply with the court order, we conclude that he was properly found to be in contempt of court. See *In re Lally*, 1999-NMSC-003, ¶¶ 10-11, 126 N.M. 566, 973 P.2d 243 (holding that indefinite suspension from the practice of law was warranted for failing to provide competent representation (Rule 16-101); by failing to act with reasonable diligence and promptness in representing a client (Rule 16-103); and by failing to keep his client reasonably informed about the status of a matter and failing to respond to reasonable requests for information (Rule 16-104)).

2. Contempt

Appellant contends that, under *Wollen v. State*, 86 N.M. 1, 2, 518 P.2d 960, 961 (1974), in indirect non-summary criminal contempt cases, the contemnor must be tried before a judge other than the judge who is the alleged object of the contempt.

Our Supreme Court has overruled its holding that a person accused of contempt should be tried before a different judge. See *State v. Stout*, 100 N.M. 472, 475, 672 P.2d 645, 648 (1983) (overruling *Wollen*, 86 N.M. at 2, 518

P.2d at 961). Under *Stout*, a judge may not hear a case if he or she becomes so embroiled in the controversy that he or she is unable to fairly and objectively decide. *Id.*; see also *In re Avallone*, 91 N.M. 777, 778, 581 P.2d 870, 871 (1978). The court in *Stout* added that "disqualification erodes the power of the district judge to control the conduct of the proceedings before the court and to maintain the dignity and authority of the court . . . [and] referral of all cases of contempt to another district judge is wasteful of judicial resources." 100 N.M. at 475.

Here, the record supports no indication that Judge Rich was ever embroiled in the controversy, nor is there any indication of partiality to warrant recusal. Therefore, we conclude that Judge Rich presided over the hearing in a fair and objective manner.

a. Collateral Bar Rule

Alternatively, under the Collateral Bar Rule, Appellant may not violate and simultaneously attack the court's appointment order when held in contempt. See *State v. Bailey*, 118 N.M. 466, 468, 882 P.2d 57, 59 (Ct. App. 1994). Our Supreme Court has held that under the Collateral Bar Rule, "a court order, issued by a court with subject matter and personal jurisdiction, must be obeyed until it is reversed, amended, or vacated." *Purpura v. Purpura*, 115 N.M. 80, 84, 847 P.2d 314, 318 (Ct. App. 1993). We, therefore, conclude that the Collateral Bar Rule precludes Appellant from violating and challenging the district court's order until the order is changed, withdrawn, or rescinded.

b. Preservation of Constitutional Claims

Appellant alleges that the district court's administrative order appointing counsel violates Article VI, Section 3 of the New Mexico Constitution and the Thirteenth Amendment, Equal Protection, Commerce and Privileges and Immunities Clauses of the United States Constitution. "The mind of the trial court must be clearly alerted to a claimed non-jurisdictional error in order to preserve it for appeal." *Shelley v. Norris*, 73 N.M. 148, 152, 386 P.2d 243, 245 (1963). Also, under *Woolwine v. Furr's, Inc.*, "[t]o preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). Here, Appellant raises a series of constitutional arguments in his brief-in-chief. The record indicates that Appellant failed to raise these issues in the district court concerning such constitutional claims. We, therefore, do not consider these claims. See *State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (describing preservation requirements for a state constitutional claim).

CONCLUSION

We affirm the district court's order holding Appellant in contempt of court.

IT IS SO ORDERED.

/s/ Ira Robinson
IRA ROBINSON, Judge

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WE CONCUR:

/s/ Michael Bustamante

MICHAEL D. BUSTAMANTE, Chief Judge

/s/ Joseph Alarid

A. JOSEPH ALARID, Judge

11th JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of Philip M. Kleinsmith, No. MS 2003-2-II

TO: Philip M. Kleinsmith
Kleinsmith & Associates, P.C.
6035 Erin Park Dr., Ste. 203
Colorado Springs, CO 80918

**ORDER TO SHOW CAUSE WHY PARTY
SHOULD NOT BE HELD IN CONTEMPT**

(Filed Jan. 22, 2003)

THIS MATTER having come before the Court on its own Motion and having reviewed the case file in SQ 2002-118-II, wherein the above-named attorney was Appointed to represent the child in said action on December 18, 2002; and the Court being notified by RMCHCS on January 10, 2003, that the child was still at the facility, and that counsel had not contacted the child to date; the Court finds good cause to set this matter for hearing.

IT IS THEREFORE ORDERED that **PHILIP M. KLEINSMITH** appear before this Court at 9:00 A.m. on the 31st day of January, 2003, or as soon thereafter as counsel can be heard, then and there to show cause why she should not be held in contempt of Court because of failure to meet with the child as previously ordered by this Court.

/s/ Joseph L. Rich
District Judge

ELEVENTH JUDICIAL DISTRICT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

In the Matter of PHILIP KLEINSMITH, No. MS 2003-2-II

**COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

(Filed Apr. 15, 2003)

THIS MATTER having come before the Court upon its order to show cause, the Court holding a telephonic hearing with the State represented by Michael R. Jones, Assistant Attorney General, and Phillip Kleinsmith representing himself, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The State called as witnesses Francisco Palochak, Chief Deputy Clerk of the Eleventh District Court and Genard Bitsilly of the Rehoboth McKinley Christian Health Care Services (RMCH).
2. On October 28, 2002, the Eleventh District Court entered an administrative order, attached hereto, that all lawyers licensed to practice law in New Mexico and having appeared as counsel in three or more cases in McKinley County within a twelve-month period would be considered to be in a position to participate in the Court's program of appointments in pro bono cases. This order was filed as CV 2002-2-II. Appointments of lawyers under this order were to occur at a random and fair manner to all attorneys practicing law in McKinley County. (A copy of the Order was entered into evidence on March 19, 2003).

3. On December 16, 2002, a mental health Program Petition was filed in the Eleventh Judicial District Court pursuant to the Children's Mental Health and Developmental Disabilities Act, NMSA 1978, Sections 32A-6-1 *et seq.* seeking appointment of an attorney for a minor child who had been admitted for psychiatric treatment at RMCH. A copy of the Petition was entered into evidence on March 19, 2003 and is attached hereto.
4. Following the District Court's receipt of the Petition the Court's Chief Deputy Clerk, Francesca Palochak, reviewed the Court's appointment list and saw that Petitioner, Phillip M. Kleinsmith, was the next attorney on the rotation to receive a Court appointment. She then prepared an Appointment of Counsel appointing Mr. Kleinsmith to represent the child and forwarded it to the Court.
5. The December 16th appointment followed the edicts of the Court's October 28th administrative order. Mr. Kleinsmith had entered as counsel on at least three cases in McKinley County in the prior twelve month period before December 16th
6. On December 18, 2002, the Honorable Joseph L. Rich signed and entered the Appointment of Counsel appointing Petitioner to represent the child. Both the Appointment of Counsel and the Program Petition were faxed to Petitioner at his office.
7. On December 19, 2002, Mr. Kleinsmith telephoned Ms. Palochak and told her that he could not represent the child as he was going on vacation the next day and would not return until December 26, 2002.
8. Ms. Palochak suggested to Mr. Kleinsmith that he contact RMCH Behavioral Health and conduct the interview with the child over the telephone. Mr. Kleinsmith responded by stating that, "I don't even give service that fast on my paying clients."

9. When Mr. Kleinsmith continued to tell Ms. Palochak why he should be relieved of the appointment, Ms. Palochak explained that she did not have the authority to relieve him of the appointment, and she suggested that he file a motion and proposed order to withdraw and fax the documents to the Court.
10. Later on December 19, 2002, Mr. Kleinsmith faxed a document entitled "Response to Appointment of Counsel" to the Court. This response was not a motion and proposed order as requested by Ms. Palochak. A copy of this "Response" was entered into evidence on March 19, 2003, and is attached hereto.
11. Mr. Kleinsmith did not contact the Court to find out whether the Court had relieved him of the appointment.
12. During the week of December 30, 2002, Ms. Palochak received a telephone call from Mr. Genard Bitsilly at RMCH stating that the child wanted to speak with her attorney and asking who the attorney was for the child. Ms. Palochak gave Mr. Bitsilly Mr. Kleinsmith's name and telephone number.
13. Mr. Bitsilly attempted to contact Mr. Kleinsmith several times and left his number at Mr. Kleinsmith's office, but was never able to speak with Mr. Kleinsmith.
14. On January 13, 2003, Ms. Palochak received another telephone call from RMCH advising her that the child had not yet spoken with her attorney despite numerous attempts by RMCH to contact Mr. Kleinsmith, and that the child was demanding to speak with an attorney.
15. Ms. Palochak prepared an Amended Appointment of Counsel and informed the Court of what had happened. On January 13, 2003, Judge Rich appointed

another attorney, Bradley L. Keeler, to represent the child.

16. On January 22, 2003, the Court issued an Order to Show Cause why Mr. Kleinsmith should not be held in contempt for failing to comply with the Appointment of Counsel or meet with the child as directed by the Court.
17. On January 24, 2003, the Court entered an Order disposing of the Children's Mental Health Act matter.

CONCLUSIONS OF LAW

1. The Administrative Order entered by the Court on October 28, 2002 was a valid court order allowing for appointment of attorneys practicing in McKinley County to be appointed to pro bono cases.
2. Mr. Kleinsmith was appointed to a pro bono case pursuant to this order.
3. Upon learning of his appointment, Mr. Kleinsmith contact the District Court and was informed that he would need to file a motion and order to withdraw his appointment.
4. Instead of filing the required motion and order, Mr. Kleinsmith filed a letter entitled "Response to Appointment of Counsel."
5. Mr. Kleinsmith's "Response" did not meet the Court's standards for withdrawal from a case.
6. Mr. Kleinsmith's inadequate "Response" and his not checking with the Court to see if he was still on the case prolonged the time that the child had to wait to be reviewed by counsel.
7. The original appointment was on December 18, 2003. The Court's secondary appointment was made on

January 13, 2003. The child's file was closed on January 24, 2003.

8. Mr. Kleinsmith's failure to follow a court order lengthened an action that ultimately took 11 days. (The amount of time from second counsel's appointment to closure of the case). The delay caused by Mr. Kleinsmith was twenty five days.
9. Mr. Kleinsmith's failure to heed a court appointment or to take appropriate action to resolve the matter is found to be in contempt of court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Phillip Kleinsmith is found to be in Contempt of Court by failing to follow the order of this court. Mr. Kleinsmith is ordered to pay a fine of \$500 to the District Court within twenty days of this ruling.

/s/ J. Rich

Joseph L. Rich
District Judge

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**IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO**

April 5, 2005

NO. 29,091

IN THE MATTER OF KLEINSMITH,

Respondent-Petitioner.

WRIT OF CERTIORARI

TO: New Mexico Court of Appeals

GREETINGS:

WHEREAS, petitioner did apply to this Court on February 15, 2005, for review of a memorandum opinion issued by the New Mexico Court of Appeals on February 4, 2005, in cause numbered 23, captioned *In re Kleinsmith*;

WHEREAS, the Supreme Court gave notice to the Court of Appeals on February 15, 2005, in compliance with Rule 12-502 NMRA of the Rules of Appellate Procedure, that a petition for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the petition for writ of certiorari has been served on the district court judge in the above entitled cause.

NOW, THEREFORE, the writ of certiorari hereby is issued and the New Mexico Court of Appeals hereby is ordered to proceed no further in cause numbered 23,999 pending further order of this Court.

IT IS SO ORDERED.

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WITNESS, Honorable Richard
C. Bosson, Chief Justice of the
Supreme Court of the State of
New Mexico, and the seal of said
Court this 5th day of April, 2005.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief
Clerk of the Supreme Court
of the State of New Mexico

**IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO**

July 5, 2005

NO. 29,091

IN THE MATTER OF KLEINSMITH,

Respondent-Petitioner.

ORDER

WHEREAS, this matter came on for consideration upon petition for writ of certiorari filed pursuant to Rule 12-502 NMRA, and the Court having considered said petition and being sufficiently advised, issued its writ of certiorari on April 5, 2005; and

WHEREAS, having considered the petition and briefs filed in the New Mexico Court of Appeals, the judgment of the Court is that the writ shall be quashed as improvidently granted, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari issued on April 5, 2005, hereby is QUASHED;

IT IS FURTHER ORDERED that the record proper, supplemental record proper, and taped proceedings shall be returned to the New Mexico Court of Appeals; and

IT IS FURTHER ORDERED that the matter is REMANDED to the New Mexico Court of Appeals to take whatever steps are necessary to convert the memorandum opinion issued on February 4, 2005, to a formal published opinion.

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IT IS SO ORDERED.

WITNESS, Honorable Richard
C. Bosson, Chief Justice of the
Supreme Court of the State of
New Mexico, and the seal of said
Court this 5th day of July, 2005.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT,
STATE OF NEW MEXICO

Trial Judge: Joseph L. Rich

Philip M. Kleinsmith,

Petitioner,

vs.

Case #27894

Joseph L. Rich,
Grant L. Foutz,
William C. Birdsall,
Douglas A. Echols,
John A. Dean, Jr,
Judges of the 11th
Judicial District(McKinley
and San Juan Counties),

Respondents.

Petition For Writ of Prohibition and Request For Stay

(Filed Jan. 30, 2003)

Name, Address and
Phone number of
Petitioner's Trial Counsel

Philip M. Kleinsmith
NM Attorney #6261
6035 Erin Park Drive #203
Colo Springs, CO 80918
800-842-8417

Petitioner requests this Court to enter a Writ of Prohibition against the Respondents. As cause therefor, it is stated:

1. *Jurisdiction.* Jurisdiction is granted by Section 3, Article 6 of the New Mexico Constitution.

2. *Circumstances.* The following are the circumstances which make it necessary to seek this Writ.

The Respondents, as judges of the 11th Judicial District have adopted the attached *Administrative Order* dated 10/23/02. Pursuant thereto on 12/18/02, Judge Rich of that Court issued an *Appointment of Counsel* to which Petitioner filed his attached *Response to Appointment of Counsel* on 12/19/02. On 1/22/03 the same judge issued the attached *Order to Show Cause* to which Petitioner filed his attached *Response to Order to Show Cause* on 1/29/03 and this *Petition*. Succinctly, Petitioner is threatened by a District Court with contempt for inadvertently not obeying illegal and unconstitutional judicial orders.

3. *Real Parties.* The real parties in interest are stated in the caption above.

4. *Legal Grounds.* The *Administrative Order* is a usurpation of Section 3, Article 6 of the New Mexico Constitution's provision that only this Supreme Court "shall have superintending control over all inferior courts". Included in this supervisory power is the power to license and regulate attorneys.

This Supreme Court has exercised its exclusive power over inferior courts by its rule on Local Rules (Rule 1-083 NMRA). It provides that district courts can adopt local rules governing its practice in civil cases only if those rules are approved by the Supreme Court. The *Administrative Order* is such a rule, not approved by this Supreme Court, disguised to avoid this Supreme Court's exclusive power to make such rules. The same argument must be made of the *Administrative Order* if it is called a criminal rule.

This Supreme Court has exercised its exclusive power over the conditions required for the practice of law by its rules on Admission to the Bar, Professional Conduct, Discipline, Legal Education and Specialization. It has not delegated any of its power to any district court. The *Administrative Order* is an usurpation of that power. It prescribes a condition for the practice of law. Moreover, the enforcement thereof: forces attorneys to practice in areas in which they may have no competence. Thereby, by force, putting them at risk of malpractice and consequently the loss of their license to practice law for breach of an attorney's duty to be competent. Conversely, if any attorney refuses to comply with this district court's order pursuant to the *Administrative Order*, the attorney risks contempt and the possible loss of his license for contempt of court. The most transparent practical problem with the *Administrative Order* is that if every New Mexico District Court adopted the *Administrative Order*, an attorney would be subjected to similar orders of appointment by at least thirteen district courts. Such havoc only practically reinforces the clear unconstitutionality of the *Administrative Order* as a usurpation of only this Supreme Court's exclusive power to regulate the practice of law.

Finally, that Order is a form of involuntary servitude which violates Petitioner's Federal Constitutional right under the Thirteenth Amendment to the United States Constitution.

5. *Grounds.* The factual and legal grounds for this petition are stated in 3 and 4 immediately above.

6. *Relief Sought.* A declaration that the *Administrative Order* and all orders pursuant thereto as to Petitioner (including the above *Appointment of Counsel* and *Order to*

Show Cause) are unconstitutional and void *ab initio*. Immediately, Petitioner requests the entry of a Stay Order because: there is high likelihood of unconstitutionality; that no damages immediate or otherwise, will result to Respondents by a stay order, and; that substantial immediate and irreparable harm and damage will result to Petitioner (i.e. harm to his professional image for being found in contempt; economic cost necessitated by an overnight 400+ mile trip to the scheduled contempt hearing and the loss of at least 2 days of work; the risk of immediate imprisonment for contempt).

7. *Irreparable Damage and Notice.* The basis of irreparable damage to Petitioner and no damage to Respondents are stated in the preceding paragraph. The Respondents have been given notice by faxing a copy to each Respondent and discussing or attempting to discuss same with each of them.

8. *Proposed Writ and Stay Order.* Same are attached.

Kleinsmith and Associates, P.C.
Attorneys for Petitioner

by /s/ Philip Kleinsmith
Philip M. Kleinsmith

Acknowledged, subscribed, and sworn to as true of his own personal knowledge by Philip M. Kleinsmith at Colorado Springs, Colorado, on January 28, 2003. Witness my hand and official seal.

App. 35

**SUSAN GRANGE
NOTARY PUBLIC,
STATE OF COLORADO**

/s/ Susan Grange
Notary

**My Commission Expires
10/25/2004**

IN THE SUPREME COURT,
STATE OF NEW MEXICO

Trial Judge: Joseph L. Rich

Philip M. Kleinsmith,

Petitioner,

vs.

Case # 27894

Joseph L. Rich,
Grant L. Foutz,
William C. Birdsall,
Douglas A. Echols,
John A. Dean, Jr,
Judges of the 11th
Judicial District(McKinley
and San Juan Counties),

Respondents.

Amendment to Petition for Writ
of Prohibition and Request for Stay

(Filed Feb. 4, 2003)

Petitioner amends his Petition in the following particulars:

A. The final paragraph of paragraph 4 thereof (Legal Grounds) is amended to read:

"Finally, that Order is a form of involuntary servitude which violates Petitioner's Federal Constitutional right under the Thirteenth Amendment to the United States Constitution and violates his right to interstate commerce under Section 2, Article IV of the United States Constitution."

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B. Petitioner withdraws his request for a stay order, because, as he previously informed this Court, the hearing for January 31, 2003 has been vacated.

Kleinsmith and Associates, P.C.
Attorneys for Petitioner

by /s/ Philip Kleinsmith
Philip M. Kleinsmith

Acknowledged, subscribed, and sworn to as true of his own personal knowledge by Philip M. Kleinsmith at Colorado Springs, Colorado, on January 28, 2003. Witness my hand and official seal.

SUSAN GRANGE
NOTARY PUBLIC,
STATE OF COLORADO

/s/ Susan Grange
Notary

My Commission Expires
10/25/2004

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
COUNTY OF MCKINLEY
IN THE DISTRICT COURT

IN THE MATTER OF PRO BONO APPOINTMENTS
CV2002-2-II

ADMINISTRATIVE ORDER

(Filed Oct. 28, 2002)

THIS MATTER having come before the Court as a result of the need to develop an effective and fair system for pro bono appointments and the Court being fully advised in the premises: FINDS:

1. That this matter was discussed at a Judge's meeting on 10/23, 2002;
2. That all Judges in attendance agreed that a uniform policy for pro bono appointments should be established;
3. That all lawyers providing legal services in McKinley County, or holding themselves out as providing legal services in McKinley County, do so as a privilege granted to them by the State. As such, the State can condition those lawyers' ability to practice law upon the acceptance of certain responsibilities in the furtherance of the administration of justice. Courts have long recognized this principle.
4. The obligations of the legal profession to serve indigent clients on court order is an ancient and established tradition.

5. Given statutory restrictions and obligations of the District Attorney's Office of the Eleventh Judicial District, Division II, special consideration must be given to how attorneys in that office will fulfill their pro bono obligations.

6. The McKinley County District Court, in order to ensure that court appointments of counsel to provide pro bono services is handled in a random, fair and reasonable fashion should establish a uniform policy for pro bono appointments.

IT IS THEREFORE ORDERED that in all cases where appointment of counsel is deemed necessary by the court, including appointments made by the domestic violence commissioner, an order of appointment form will be sent by the court to the clerk of the court. The clerk will maintain a list of all lawyers eligible for appointment as set forth below. The clerk will insert into the proposed order the name of the counsel next on the court's list for appointment, and return the form to the judge requesting the appointment. Once the appointment has been made, the court will notify the clerk's office, and the appointment will be noted on the clerk's list. No lawyer having received a pro bono appointment will again be eligible for appointment until all lawyers on the clerk's list have received a pro bono appointment.

IT IS FURTHER ORDERED that the list of counsel eligible for appointment kept by the court clerk will include all lawyers listing an office in McKinley County in the State Bar of New Mexico's Bench and Bar Directory, all lawyers and/or law firms listed as counsel on three or more matters filed and/or pending in any twelve month period in the McKinley County District Court or Magistrate

Court, and all lawyers doing business and/or holding themselves out as doing business in McKinley County through advertisements in the Qwestdex or other yellow pages for McKinley County.

IT IS FURTHER ORDERED that each time a lawyer participates in the McKinley County court clerk's pro bono program, that participation will be treated as a court appointment for purposes of this pro bono appointment policy.

IT IS FURTHER ORDERED that lawyers that have a conflict in any particular type of case must notify the court clerk of the conflict and the clerk will note the conflict on the court clerk's list so that, if a preexisting conflict exists in certain types of cases, that lawyer is not assigned to that type of case, but instead is appointed to the next case in which no conflict exists.

IT IS FURTHER ORDERED that the full time attorneys employed by the District Attorney's Office shall not be appointed to provide services on CYFD, Domestic Violence, or mental commitment cases. The District Attorney should meet annually with the McKinley County District Court judges to discuss how lawyers in the District Attorney's Office will fulfill their pro bono obligations.

IT IS FURTHER ORDERED that the Judges and staff shall assist with carrying out the purpose of this Order.

October 23, 2002

/s/ J. Rich
District Court Judge

ELEVENTH JUDICIAL DISTRICT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of the mental health treatment of:

MICHELLE C. JOHNSON,

a minor.

No. SQ2002-118-II

Response to
Appointment of Counsel

(Filed Dec. 19, 2002)

Philip M. Kleinsmith responds to his appointment of counsel herein by stating that his office received this order by fax at 10:46 a.m. on December 18, 2002. It was given to him at about 12:30 p.m. Mr. Kleinsmith spent the entire day yesterday in a hearing and has spent all day today attending to matters for which clients have paid him. No other time is available before he leaves on a planned vacation (12/19/02 thru 12/24/02) early in the morning on 12/19/02. Mr. Kleinsmith requests the Court to appoint someone else.

It would be appreciated if my name were properly spelled (see below).

Kleinsmith & Associates, P.C.
Attorneys for Plaintiff

/s/ Philip M. Kleinsmith
Philip M. Kleinsmith #6261
KLEINSMITH & ASSOCIATES,
P.C.
6035 Erin Park Dr., Ste. 203
Colorado Springs, CO 80918
(800) 842-8417

11th JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of Philip M. Kleinsmith, No. MS 2003-2-II

TO: Philip M. Kleinsmith
Kleinsmith & Associates, P.C.
6035 Erin Park Dr., Ste. 203
Colorado Springs, CO 80918

ORDER TO SHOW CAUSE WHY PARTY
SHOULD NOT BE HELD IN CONTEMPT

(Filed Jan. 22, 2003)

THIS MATTER having come before the Court on its own Motion and having reviewed the case file in SQ 2002-118-II, wherein the above-named attorney was Appointed to represent the child in said action on December 18, 2002; and the Court being notified by RMCHCS on January 10, 2003, that the child was still at the facility, and that counsel had not contacted the child to date; the Court finds good cause to set this matter for hearing.

IT IS THEREFORE ORDERED that PHILIP M. KLEINSMITH appear before this Court at 9:00 A.m. on the 31st day of January, 2003, or as soon thereafter as counsel can be heard, then and there to show cause why she should not be held in contempt of Court because of failure to meet with the child as previously ordered by this Court.

/s/ Joseph L. Rich

District Judge

11th JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of Philip M. Kleinsmith,

No. MS 2003-2-II

Response to Order
To Show Cause Why Party
Should Not be Held in Contempt
and Motion to Disqualify

Being duly sworn upon his oath, Philip M. Kleinsmith states of his own personal knowledge:

1. His Response in SQ2002-118-II stated good reason why he could not accept the appointment and why the appointment of another attorney was appropriate. The reasonable conclusion from that Response and the Court's failure to grant or deny the Response was that the Court had appointed another attorney. Mr. Kleinsmith worked on that reasonable conclusion until on January 27, 2003, when he received the Order to Show Cause. Obviously, Mr. Kleinsmith lacked the intent requisite to any contempt.

2. A copy of Mr. Kleinsmith's *Petition For Writ of Prohibition and Request to Stay* are filed with this *Response to Order to Show Cause*. From all of those documents, it is reasonable to conclude that the Court has no desire to conclude this matter, except on grounds most unfavorable and onerous to Mr. Kleinsmith. This matter could have been (and still can be) resolved by phone: without this onerous hearing, by the court withdrawing its Order to Show Cause, and; the parties agreeing to the resolution of this matter by the New Mexico Supreme Court's ruling on the attached *Petition for Writ of Prohibition*.

That Petition shows there are grave constitutional issues that must be resolved before this Court should take any further action, other than striking its own Order to Show Cause.

3. The attached *Petition* further shows that all judges of this Court should disqualify themselves and same is hereby requested. As further grounds for such disqualification, it is obvious that the judges of this Court are the enactors and/or continuing sponsors of the 10/23/02 Administrative Order which is the basis of the Court's Orders in SQ2002-118-II.

Kleinsmith & Associates, P.C.
Attorneys for Petition

by /s/ Philip M. Kleinsmith
Philip M. Kleinsmith

Certificate of Service

I hereby certify that on the 29th day of January, 2003, I mailed, postage prepaid via the ~~U.S. Postal Service~~, copies (as indicated below) of the foregoing *Response to Order To Show Cause Why Party Should Not be Held in Contempt and Motion to Disqualify*, to the following addresses: [*express mail and by fax /s/ PK]

Address
Clerk of Court
McKinley County
201 West Hill St.
Gallup, NM 87301

Original / Copies
01 / 00

/s/ Philip M. Kleinsmith

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
February 10, 2003

NO. 27,894

PHILIP M. KLEINSMITH,

Petitioner,

vs.

HON. JOSEPH L. RICH,
HON. GRANT L. FOUTZ,
HON. WILLIAM C. BIRDSALL,
HON. DOUGLAS A. ECHOLS,
HON. JOHN A. DEAN, Jr.,
Judges of the 11th
Judicial District (McKinley
and San Juan Counties),

Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon Petition for Writ of Prohibition and Request for Stay, and the Court having considered said petition and response and request, and being sufficiently advised, Justice Pamela B. Minzner, Justice Patricio M. Serna, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the Petition, and Request for Stay hereby are denied. Request for Stay hereby are denied.

IT IS SO ORDERED.

WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 10th day of February, 2003.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

11th JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of Philip M. Kleinsmith,

No. MS 2003-2-II

Response to Order
To Show Cause Why Party
Should Not be Held in Contempt
and Motion to Disqualify

Being duly sworn upon his oath, Philip M. Kleinsmith states of his own personal knowledge:

1. His Response in SQ2002-118-II stated good reason why he could not accept the appointment and why the appointment of another attorney was appropriate. The reasonable conclusion from that Response and the Court's failure to grant or deny the Response was that the Court had appointed another attorney. Mr. Kleinsmith worked on that reasonable conclusion until on January 27, 2003, when he received the Order to Show Cause. Obviously, Mr. Kleinsmith lacked the intent requisite to any contempt.

2. A copy of Mr. Kleinsmith's *Petition For Writ of Prohibition and Request to Stay* are filed with this *Response to Order to Show Cause*. From all of those documents, it is reasonable to conclude that the Court has no desire to conclude this matter, except on grounds most unfavorable and onerous to Mr. Kleinsmith. This matter could have been (and still can be) resolved by phone: without this onerous hearing, by the court withdrawing its Order to Show Cause, and; the parties agreeing to the resolution of this matter by the New Mexico Supreme Court's ruling on the attached *Petition for Writ of Prohibition*.

That Petition shows there are grave constitutional issues that must be resolved before this Court should take any further action, other than striking its own Order to Show Cause.

3. The attached *Petition* further shows that all judges of this Court should disqualify themselves and same is hereby requested. As further grounds for such disqualification, it is obvious that the judges of this Court are the enactors and/or continuing sponsors of the 10/23/02 Administrative Order which is the basis of the Court's Orders in SQ2002-118-II.

Kleinsmith & Associates, P.C.
Attorneys for Petition

by /s/ Philip M. Kleinsmith
Philip M. Kleinsmith

Certificate of Service

I hereby certify that on the 29th day of January, 2003, I mailed, postage prepaid via the ~~U.S. Postal Service~~, copies (as indicated below) of the foregoing *Response to Order To Show Cause Why Party Should Not be Held in Contempt and Motion to Disqualify*, to the following addresses: [*express mail and by fax /s/ PK]

Address
Clerk of Court
McKinley County
201 West Hill St.
Gallup, NM 87301

Original / Copies
01 / 00

/s/ Philip M. Kleinsmith

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The Petition for Writ of Prohibition and Request for Stay which was attached to this Response is Appendix 31-46.

11TH JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

TRANSCRIPT OF HEARING ON MARCH 19, 2003*

JUDGE RICH: The matter before the court is MS2003 McKinley County #2 Division 2 and it is an Order to show cause why Mr. Philip Kleinsmith should not be held in contempt. Mr. Kleinsmith is present and Mr. Knight Jones is here representing the State of New Mexico. Ill hear first from Mr. Jones if you wish to make an opening or if you wish to delay that, you may then followed by Mr. Kleinsmith.

Yes Sir, umm this is Mike Jones with the Attorney General's Office

JUDGE RICH: Yes Sir.

MICHAEL KNIGHT JONES: Umm my opening in this case is just really short, this is a case where-Mr. Kleinsmith was appointed under pro bono rules of the New Mexico State Bar and the the Rules of Conduct in which he was to perform the function of as an intermediary for a Michele Johnson and he failed to perform that function and in addition to failing to perform that function, was given the option of filing a Motion and Order allowing his withdrawal which he failed to do and because of his failure to either perform the duties as he was appointed to do or to have a Motion and Order filed that would have allowed

* Any typographical and/or incorrect punctuation found in the following document were intentionally left to show accurately how the original document appeared.

him to withdraw he had the State feels he is in contempt of court.

JUDGE RICH: Ok Mr. Kleinsmith.

PHILIP KLEINSMITH: Yes, Your Honor umm I would disagree with counsel that I was appointed pursuant to the pro bono rules, umm I believe I was appointed pursuant to the Administrative Order of this court which I cite in my response umm and I don't think the basis of that is recited to be pro bono it is recited to be the statutory requirement of appointed people to represent, what should I say, people who have been institutionalized in pursuant to Statute to in order to have a lawyer appointed to advise them of their rights umm though I take ___ counsel was incorrect on that basis I also believe that he is incorrect that there was no Motion and Order filed I specifically filed a what I denominated ahh I don't know if I can find that immediately, if I may have a moment to find it, I filed the response saying that I was going to be on vacation this order was entered for me to advise this individual approximately a week before Christmas of 2002 and I filed a response immediately by both mail and by fax to the court stating I was not available and I did not believe that I could fulfill the order of the court. Um and as I state in my response to the Order to show cause I believed that the court would honor that request and appoint someone else. Um I did not I don't know of any rule that says I have to submit with that an order that would have been a simple matter of the court merely honoring that order by honoring my request and appointing someone else so I think counsel is incorrect on both of those bases also I would like to renew my motion which I made in the response for the court to disqualify ___ the bases of that is not only the court but all other judges of this court because of they are

those judges are my adversaries in this matter, they are my opponents, they are the people who are trying to enforce a rule and it is a violation of my denial of my substantial due process of law right to have an impartial trier of fact to hear this out of the fourteenth amendment of the United States Constitution um as I said, all judges to this matter are party because all of these judges either by actual participation in adopting the rule or by being accessors and members of the court which continue to sanction that rule umm are parties and its their rule it is obvious to me, at least, that when one is trying to enforce its own rule or their own rule um they are adversaries and is improper under substantial due process of law provision for them to sit as triers of the veracity or the legality constitutionally or otherwise of that rule. Um furthermore, I would wish to call Judge Rich as a witness in this matter unless he stipulates that he is the party and a witness on the basis I just recited is in fact the basis of this whole matter. I would further add to my response I would appropriate by referencing to um my response here but would add that the rule is evolved to the violation of the Privileges and Immunities Clause of the Federal Constitution, Equal Protection Clause of the Federal Constitution and the Commerce Clause of the Federal Constitution. Furthermore I would add even if I had the duty to do this, I had no means to perform the advisory function that I was ordered to do, um, because it would seem to me that, that requires actual face to face contact with party who I was supposed to advise umm the importance of that is uh that I have am not in either intentional or willful violation of a court order because as the motion that I referred to already that I advised the court that I could not perform the function clearly indicated that I had not intent to violate the court order that I wanted to be excused for good reason

um and I did not have the ability to perform that and those criteria are necessary for a contempt of court so those with saying those things ah I am ready to proceed.

JUDGE RICH: All right Mr. Jones would you proceed with respect to the order to show cause.

MICHAEL JONES: Yes Sir, um Your Honor I would first like to call Miss Francesca Palachek.

JUDGE RICH: All right, Miss Palachek ah let's see if we can allow you to speak into those two microphones down there if we can pick you up you may remain seated otherwise you'll have to come to the bench.

MISS PALACHEK: Ok.

JUDGE RICH: Can you hear Miss Palachek? Miss Palachek.

PHILIP KLEINSMITH: It was difficult for me it.

MICHAEL JONES: Um, I do hear her as well, Your Honor.

JUDGE RICH: Approach the bench. Raise your right hand do you swear that the testimony you are about to give will be the truth so help you God?

MISS PALACHEK: I do.

JUDGE RICH: Proceed.

MICHAEL JONES: Yes. Um could you please state your name for the court ma'am?

MISS PALACHEK: My name is Francesca P. Palachek.

MICHAEL JONES: And what do you do?

MISS PALACHEK: I'm the Chief deputy Clerk for the 11th Judicial District Court in McKinley County New Mexico.

MICHAEL JONES: How long have you worked there in this position?

MISS PALACHEK: Ah since May 15 1989.

MICHAEL JONES: OK. . . . and do you know, um of the courts order on pro bono appointments?

MISS PALACHCK: It's an Administrative Order yes it was filed on October 28 2002 and in that order I was directed to, um, ah, be in charge of the list in which attorney ah attorneys are appointed to represent clients in ah these voluntary commitments in other mental health cases um in abuse and neglect cases and also in domestic violence contempt cases, um and the way it its three pages long and it states that if an attorney has made an appearance in the McKinley County District Court three or more times in the calendar year, they become eligible for appointment and the way we determined what all the folks would be on the list, was we ran um a case list for the entire year, we went thru their New Mexico attorney code and brought up their names and Mr. Kleinsmith did appear three times three different cases.

MICHAEL JONES: Ok

MISS PALACHEK: So he became eligible.

MICHAEL JONES: All right. Did you place his name on that list then?

MISS PALACHEK: Yes.

MICHAEL JONES: As he became eligible?

MISS PALACHEK: Yes.

MICHAEL JONES: Did you make an appointment for him?

MISS PALACHEK: Yes I did.

MICHAEL JONES: Ok and the power to make this appointment, where did you receive this power?

MISS PALACHEK: Through the Administrative Order, Well the Order signed by the judge I just fill in the order for the judge.

MICHAEL JONES: Ok Al right can you tell us about the order involving Mr. .Mr. Kleinsmith?

MISS PALACHEK: Ah.. I do not have the actual order in front of me but its an order to, ah, appoint him, hang on I need to flip to that order, hang on., um, ok its entitled Appointment of Counsel and its states that pursuant to Section 32 a 612 g of the New Mexico statute, an Attorney shall be appointed to represent the child in this matter and Mr. Kleinsmith was appointed to represent Michele C. Johnson. Um, it also advises Mr. Kleinsmiith that he shall meet with the child and advise the court of the meeting pursuant to.

MICHAEL JONES: Ok when was this order entered?

MISS PALACHEK: December 18, 2002.

MICHAEL JONES: Ok . . . when the order was entered, - how did you contact Mr. Kleinsmith?

MISS PALACHEK: Um what I did was I faxed him a copy of the order, um as well as the program petition, um, it also an application of payment of attorneys fees for

mental health cases cause there is ah, they can get paid a nominal fees for that.

MICHAEL JONES: Ok.

MISS PALACHEK: Um so I faxed that to him at his fax number.

MICHAEL JONES: All right. And did you speak with Mr. Kleinsmith?

MISS PALACHEK: Ah, Mr. Kleinsmith telephoned to me on December 19 2002 and we spoke at length, um he explained to me that he thought like he shouldn't have to represent this child that he wouldn't that he would not represent her cause he was going on vacation the next day and wouldn't be returning until I believe December 26 th and then we talked for awhile and he was adamant that he couldn't do this and I told him that I didn't you know I did not have the authority to relieve him of the appointment that he would need to file a motion and an order with the court to get relieved of that and then we went, we talked for several minutes and I remember telling him, he was upset, I mean he seemed upset and he I remember telling him "Mr. Kleinsmith in the time that you talked spent arguing with me about the appointment you could have interviewed the child over the phone." And then he made a comment to me "I don't give service that fast to my paying clients".

MICHAEL JONES: OK. Now did you talk ..now you said you informed him about filing a Motion and order?

MISS PALACHEK: Yes.

MICHAEL JONES: In the past have other attorneys been unable to attend to their appointments immediately?

MISS PALACHEK: Yes.

MICHAEL JONES: And what is the normal procedure to allow them to withdraw?

MISS PALACHEK: They have to file a Motion to Withdraw and that's a request to the court and the court will either grant it or deny that motion. So they usually submit a proposed order.

MICHAEL JONES: Ok. And did Mr. Kleinsmith submit such a proposed Motion and order?

MISS PALACHEK: No. He . . .

MICHAEL JONES: What did he submit to your court?

MISS PALACHEK: Ah. a document entitled Response to Appointment of Counsel.

MICHAEL JONES: And do have that document with you?

MISS PALACHEK: Ah, yes.

MICHAEL JONES: Um, Mr. Kleinsmith?

PHILIP KLEINSMITH: Yes.

MICHAEL JONES: Have you seen this document Response to Appointment of Counsel?

PHILIP KLEINSMITH: Yes I prepared it and filed it.

MICHAEL JONES: Um At this time I move to admit that into the record.

JUDGE RICH: All right. Ah, state's Exhibit 1.

MICHAEL JONES: Ok

JUDGE RICH: Is admitted.

MICHAEL JONES: Um Miss Palachek, um, excuse me.

MISS PALACHEK: Its ok.

MICHAEL JONES: In your initial um order that you sent to Mr. Kleinsmith, do you have that with you as well?

MISS PALACHEK: Yes.

MICHAEL JONES: Um, Mr. Kleinsmith did you receive that appointment of counsel as well?

PHILIP KLEINSMITH: Yes.

MICHAEL JONES: I would like to move that, if theres no objection I move to enter Appointment of Counsel into the record as well.

PHILIP KLEINSMITH: No objection.

JUDGE RICH: All right. That will be state's Exhibit 2.

COURT MONITOR: And what is that judge?

JUDGE RICH: Its a..read it.

MISS PALACHEK: It's the Appointment of Counsel.

JUDGE RICH: It'll be received. State's Exhibit 2.

MICHAEL JONES: Thank you. Um and finally Miss Palachek do you have a copy of the Administrative Order with You?

MISS PALACHEK: Yes I do.

MICHAEL JONES: Um could you .. Mr. Kleinsmith have you seen a copy of that order as well?

Yes I believe I've seen it, ah if she could be so kind as to fax that to me to make sure I have it in my file that's fine.

PMK

Sure. FP

And at this time I move that it be entered as well. MJ

States exhibit 3 will be received namely the Administrative Order. JR

Thank you. MJ

Now Miss Palachek after the 19th did you hear what happened in this matter? MJ

MISS PALACHEK: Uh I didn't really . . .

PHILIP KLEINSMITH: Ah Your Honor I have to object. The question was have you heard which on its faith, calls for hearsay.

JUDGE RICH: Mr. Jones.

MICHAEL JONES: I'll rephrase the question. Miss Palachek did you speak with Mr. Kleinsmith after this?

MISS PALACHEK: No I did not.

MICHAEL JONES: Ok what was your next action in this matter?

MISS PALACHEK: Ah during the week of Dec 30 I received a phone call from RMCH from someone from RMCH I think it was Mr. Bitsilly.

MICHAEL JONES: RMCH, I'm sorry.

MISS PALACHEK: RMCH Rihobuck, McKinley Christian Hospital Mental Health Behavioral Health asking

who the attorney of record was for Michele Johnson. Um they we told Philip Kleinsmith and they wanted the phone number so that they could call him and so we gave it to them.

MICHAEL JONES: Ok what did you do next after giving the phone number?

MISS PALACHEK: I didn't do anything.

MICHAEL JONES: Ok um did you receive, what did you do to aleveate this appointment?

MISS PALACHEK: At that time I didn't do anything til I got a subsequent phone call.

MICHAEL JONES: What happened with this subsequent phone call?

MISS PALACHEK: On January 13th I received I received another phone call from RMCH behavioral health indicating that the child had not talked to her attorney as of yet um dispite their attempts to contact the attorney. um I was also informed by Mr. Bitsilly that she was adamant that she needed to speak to an attorney. I got.. I wrote.. I prepared another order I wrote a note to the judge indicating that Mr. Kleinsmith had never met with the individual and that um I felt it was pertient that we get someone over there fast, so we got a local attorney to over..right..we appointed someone locally and um they went over and in the next couple days, I believe.

MICHAEL JONES: OK. So did you, you filed a new amended Order of Appointment, is that correct?

MISS PALACHEK: Yes.

MICHAEL JONES: And who was that attorney?

MISS PALACHEK: Um, I believe it was, hang on, I don't want to go on my memory, um Bradley Culer, I believe, Let me look and it was an amended order of Appointment of Counsel and it appointed him on the basis attorney Philip Kleinsmith failure to contact the child.

MICHAEL JONES: OK and do you have a copy of that amended order?

MISS PALACHEK: Yes I do.

MICHAEL JONES: Have you ever sent a copy of that amended order to Mr. Kleinsmith?

MISS PALACHEK: No, I have not.

MICHAEL JONES: OK would you be willing to send that to Mr. Kleinsmith?

MISS PALACHEK: I can fax it to him, sure.

MICHAEL JONES: Mr. Kleinsmith, if we fax this to you would you object to this being entered into the record?

PHILIP KLEINSMITH: No.

MICHAEL JONES: Thank You Sir. At this time the state would move to enter in Exhibit 4 which is the Amended Order of Appointment.

JUDGE RICH: Exhibit 4 will be received.

MICHAEL JONES: Thank you Sir. So um, besides the, your initial contact with Mr. Kleinsmith on the 19th had, did you ever hear from him besides that date?

MISS PALACHEK: No I did not.

MICHAEL JONES: Ok. Did he send any more faxes to you or any requests or motions?

MISS PALACHEK: No he did not.

MICHAEL JONES: Just that initial response?

MISS PALACHEK: Yes.

MICHAEL JONES: Ok. Um well at this time the state has no more questions of Miss Palachek.

JUDGE RICH: All right, um, Mr. Kleinsmith?

PHILIP KLEINSMITH: Um, yes Miss Palachek, is that correct?

MISS PALACHEK: Yes Sir.

PHILIP KLEINSMITH: Excuse me, um I forget the exhibit number but its the response to appointment of counsel. Do you have that before you?

MISS PALACHEK: Yes Sir, state's exhibit 1.

PHILIP KLEINSMITH: Ok. Ah does it not say in the final sentence of that paragraph, "Mr. Kleinsmith requests the court to appoint someone else"?

MISS PALACHEK: Yes.

PHILIP KLEINSMITH: Does it not explain that I would be absent from the 19th thru the 24th?

MISS PALACHEK: It does.

PHILIP KLEINSMITH: I'm sorry.

MISS PALACHEK: It does say that yes.

PHILIP KLEINSMITH: Ok. So in substance would you agree that this is as you call it a motion to be excused or whatever terminology you wish to use?

MISS PALACHEK: Uh, I would not and neither would the docket clerk. I did not see this document. When it was filed, the docket clerk docketed it and they are not taught to send up responses, that's not considered something the judge would see, they send up motions.

PHILIP KLEINSMITH: So you're saying this whole thing has come about because the wrong label was used?

MISS PALACHEK: Well it's not a motion that we're accustomed to.

PHILIP KLEINSMITH: Is that ma'am I asked you whether or not this whole thing had come about because an improper label was affixed to something.

MISS PALACHEK: No I believe because..because an order was not entered excusing you from..

PHILIP KLEINSMITH: I didn't ask you that.

PHILIP KLEINSMITH: Your Honor I ask the court to direct the witness to answer the question. And the question is: Is does not the response ask for someone else to be appointed?

MISS PALACHEK: Yes it does.

PHILIP KLEINSMITH: And because the label, Motion to appoint somebody else or whatever you wished was not used that has precipitated this course of events? Is that correct?

MISS PALACHEK: No that is not correct it's not the label I wish, Sir its its what's customarily filed in this court.

PHILIP KLEINSMITH: I didnt ask you ma'am what you want your. . . .

MISS PALACHEK: My answer is No Mr. Kleinsmith. The answer is No.

PHILIP KLEINSMITH: But you do agree that a request to appoint someone else is contained within that response?

MISS PALACHEK: Yes.

PHILIP KLEINSMITH: Your testimony has been that you have received you've used initials of some organization, what do those initials stand for?

MISS PALACHEK: Rehobth McKinley Christian Hospital . . . Health care..actually Services. RMCH? Rehobth McKinley Christian Health.

PHILIP KLEINSMITH: Ok. Um you said that you have only received calls . . . you only received calls from them concerning the fact that I did not talk to this child?

MISS PALACHEK: Yes.

PHILIP KLEINSMITH: Did you ever call me with regard to your information that I had not contacted the child?

MISS PALACHEK: No sir.

PHILIP KLEINSMITH: Those are my questions, Your Honor.

JUDGE RICH: All right. What's next??

MICHAEL JONES: Um the state calls Mr. Gerard Bisilly.

JUDGE RICH: Mr. Bitsilly.

MICHAEL JONES: Bitsilly, sorry, excuse me.

JUDGE RICH: Do you swear that the testimony you are about to give will be the truth so help you God?

GERARD BITSILLY: I do.

All right. Proceed. JR

MICHAEL JONES: Thank you sir, um please state your name sir.

GERARD BITSILLY: My name is Gerard Bitsilly.

MICHAEL JONES: And where do you work sir?

GERARD BITSILLY: Robath Christian Health Care Services Behavioral Health Services Department.

MICHAEL JONES: Ok, and do you recall a client by the name of Michele Johnson?

GERARD BITSILLY: Yes, I do.

MICHAEL JONES: And can you tell us when she arrived at your hospital?

GERARD BITSILLY: She was admitted on 12/13/02 at 1700 hrs.

MICHAEL JONES: All right we are discussing a matter regarding an appointment of Counsel to review her case. Tell us what this is about.

GERARD BITSILLY: Well my job as an adolescent case manager is by children's code to appoint an adolescent with legal representation within 72 hours upon admission.

MICHAEL JONES: Ok now you refer to the childrens code. Is that the New Mexico Statute?

GERARD BITSILLY: Yes sir.

MICHAEL JONES: Ok. and so what is your process to get an attorney for this child?

GERARD BITSILLY: My process is to fill out an application to Appointment of Counsel and which is faxed to the 11th District Court here in Gallup.

MICHAEL JONES: And was that done with Miss Johnson?

GERARD BITSILLY: Yes it was.

MICHAEL JONES: And did you receive any paperwork regarding this appointment?

GERARD BITSILLY: Ah, No I don't, all I do is fax the ah the petition to the District Court house and upon there wait for their response to see who would be their legal representation.

MICHAEL JONES: Ok and what happened with Miss Johnson's case?

GERARD BITSILLY: Well we have not, its quite common that we don't get a response right away.

MICHAEL JONES: Ok.

GERARD BITSILLY: Um in this case it seemed to be prolonged um the petition was faxed on a Monday it was faxed on 12/16/02 on a Monday following that Sunday the next business day.

MICHAEL JONES: Ok and when did you finally hear from someone?

GERARD BITSILLY: Well her first initial request was 12/29 to speak to a legal representation person and um Monday on 12/30 I contacted the office here in Gallup and I found out her legal representation was out of Colorado. So um when I called on a Monday I was informed he was on vacation.

MICHAEL JONES: Ok what did you do next?

GERARD BITSILLY: Um I had to wait I left a message for him to call back ah but I have never received anything.

MICHAEL JONES: Ok you say "him" who is this "him".

GERARD BITSILLY: Um Philip Kleinsmith.

MICHAEL JONES: Ok so you left a message for him did you ever receive any and what happened did you get a call back from him?

GERARD BITSILLY: No sir.

MICHAEL JONES: What did you do when you received no call from him?

GERARD BITSILLY: Well ah I continued to wait, made additional phone calls but received nothing, sir.

MICHAEL JONES: From Mr. Kleinsmith?

GERARD BITSILLY: Yes sir.

MICHAEL JONES: What happened after your continued calls to Mr. Kleinsmith were returned unanswered?

GERARD BITSILLY: Well I called the courthouse here and when I did find out he was from Colorado I requested if we could have legal local legal representation for this adolescent.

MICHAEL JONES: Ok and did that occur?

GERARD BITSILLY: Ah I was told of a process I spoke to the lady here in the courthouse and she gave me the process of what was needed to be done um I didn't pursue it any further after that.

MICHAEL JONES: Ok did somebody did an attorney finally speak to Miss Johnson?

GERARD BITSILLY: Yes sir she was finally able to speak to an attorney on 1/16/03.

MICHAEL JONES: All right. And with this process do the attorneys usually come to the hospital or how is it usually handled this must happen quite a bit.

GERARD BITSILLY: Yes sir it does. They are given the option of either calling the hospital or coming in person ah most commonly they would call and ah request a face to face interview but ah at times there is a telephone interview initiated if that s they way they wish to proceed.

MICHAEL JONES: Ok but during the whole process you never heard from Mr. Kleinsmith, is that correct?

GERARD BITSILLY: That is correct.

MICHAEL JONES: Ok thank you no further questions for this witness.

JUDGE RICH: All right. Mr. Bitsilly, Mr. Kleinsmith.

PHILIP KLEINSMITH: Yes thank you Your honor Ahh Your name again sir.

GERARD BITSILLY: Gerard Bitsilly.

PHILIP KLEINSMITH: I could not hear your last name.

GERARD BITSILLY: Bitsilly.

PHILIP KLEINSMITH: Bacilli?

GERARD BITSILLY: Yes sir

JUDGE RICH: Spell it for Mr. Kleinsmith.

GERARD BITSILLY: B-i-t-s-i-l-l-y.

PHILIP KLEINSMITH: Did you ever receive or did you ever talk to me personally?

GERARD BITSILLY: No sir.

PHILIP KLEINSMITH: No further questions Your Honor.

JUDGE RICH: All right can this witness be excused?

MICHAEL JONES: Yes Your Honor.

JUDGE RICH: Your are excused Mr. Bitsilly. Thank you

GERARD BITSILLY: Thank you.

JUDGE RICH: All right. Mr. Jones.

MICHAEL JONES: Yes Your Honor. At this time the state has no further witnesses and we rest our case.

JUDGE RICH: All right. Mr. Kleinsmith?

PHILIP KLEINSMITH: I would incorporate what I have said previously as an officer of the court ah and state I never received a call either voice mail or otherwise from the last witness. And I would incorporate by reference if the court permits it, ah what we referred to ah as and is all exhibit here of both my response to the order appointing me and the response to this order to show cause, plus the amendments that I have stated.

JUDGE RICH: Mr. Jones do You have any objections.

MICHAEL JONES: No sir.

JUDGE RICH: Au right. Those items will be received we will call them defense ah respondents Exhibit A cumulatively.

COURT MONITOR: And what are those judge?

JUDGE RICH: And if you would for the monitor recite those items you wish to be entered as exhibits, Mr. Kleinsmith.

PHILIP KLEINSMITH: Ah the one document in this action is entitled Response to Order to show cause why party should not be held in contempt. And Motion to disqualify, the other document is already an exhibit the number I don't recall entitled Response to appointment of Counsel.

JUDGE RICH: All right. Thank you. What's next?

PHILIP KLEINSMITH: I have nothing further Your honor.

MICHAEL JONES: And the state has nothing further as well Your Honor.

JUDGE RICH: All right, gentlemen ah what I propose is ah I will ask that each party to submit Findings of Fact and Conclusions of Law to me by 5pm April 4, 2003.

PHILIP KLEINSMITH: Findings of Fact and what else Your honor?

JUDGE RICH: Conclusions of Law.

PHILIP KLEINSMITH: Ok and the date was April the 4th?

JUDGE RICH: Yes sir.

PHILIP KLEINSMITH: Um we submit these I presume to each other at the same time?

JUDGE RICH: Yes.

PHILIP KLEINSMITH: I understand.

JUDGE RICH: Any other questions?

MICHAEL JONES: No sir.

JUDGE RICH: All right. If not we will be in recess.

PHILIP KLEINSMITH: Thank you

MICHAEL JONES: Thank you

11th JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of Philip M. Kleinsmith No. MS 2003-2-II

Finding of Fact, Conclusions of Law and Judgment

This matter was heard on March 19, 2003 at which Michael Jones, New Mexico Assistant Attorney General, appeared for the Honorable Joseph L. Rich. The Respondent represented himself. Both attorneys appeared telephonically. The other witnesses appeared in person. Based thereon and Respondent's Affidavit filed herein the court finds, concludes and orders as follows:

A. Findings of Fact

1. Apparently this Court and all of its judges adopted an Administrative Order dated October 23, 2002 ("Administrative Order"). "Apparently", because it does not state who approved or disapproved it. It is only signed by Judge Rich. It states its purpose to be "... to develop an effective and fair system for pro bona appointments ..." and:

"3. That all lawyers providing legal services in McKinley County or holding themselves out as providing legal services in McKinley County, do so as a privilege granted to them by the State. As such, the State can condition those lawyers' ability to practice law upon the acceptance of certain responsibilities in the furtherance of the administration of justice. Courts have long recognized this principle.

4. The obligations of the legal profession to serve indigent clients on court order is an ancient and established tradition.

5. Given statutory restrictions and obligations of the District Attorney's Office of the Eleventh Judicial District, Division II, special consideration must be given to how attorneys in that office will fulfill their pro bono obligations."

As to the exempted District Attorneys, it provides:

"The District Attorney should meet annually with the McKinley County District Court judges to discuss how lawyers in the District Attorneys Office will fulfill their pro bono obligation."

The Administrative Order provides no similar alternative for lawyers who wish to fulfill their alleged pro bono obligations in other ways (e.g. charitable contribution) as apparently district attorneys may do.

2. Section 3, Article 6 of the New Mexico Constitution provides that only the New Mexico Supreme Court "... shall have superintending control over all inferior courts". The New Mexico Supreme Court has exercised this exclusive power by its rule on Local Rules (Rule 1-083 NMRA) which requires local rules to be approved by it. The Administrative Order has not been so approved.

This constitutionally exclusive power includes the power to license and regulate attorneys (See New Mexico Supreme Court rules on Admission to Bar, Professional Conduct, Discipline, Legal Education and Specialization). Rule 16-101 of the Rules of Professional Conduct states:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation." (Also see 16-104 B).

Rule 16-601 and 16-602 of those rules state:

"A lawyer should aspire to render at least fifty (50) hours of *pro bono publico* legal services per year . . ."

"A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- A. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- B. representing the client is likely to result in an unreasonable financial burden on the lawyer, or
- C. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."

3. The Administrative Order prescribes that any attorney or law firm who is involved in more than two cases in any twelve months in the McKinley County courts shall be appointed on a rotating basis " . . . where appointment of counsel is deemed necessary by the court, . . ."

4. The Respondent is an attorney whose practice is limited to real estate foreclosures and related matters in twenty-four states where he is licensed. This includes filing more than two foreclosures per year in more than ten New Mexico counties per year. The same is true in many other states. He has not practiced in the mental

health area for over ten years. He does not wish to practice in that area. Respondent's only residence and only office are in Colorado Springs, Colorado, at least 300 miles from this court. (See Respondent's Affidavit)

5. On December 18, 2002, Judge Rich signed an Appointment of Counsel ("12/18/02 Appointment") in case No. SQ2002-118-II wherein he, pursuant to child mental health statute, 32A-6-12G, I & J NMSA 1978 (as amended), and the Administrative Order appointed Respondent to fulfill certain statutory duties pursuant to that statute. Those statutes direct that an attorney represent a child, but, they do not state that an attorney be appointed against his will. Those statutes specifically require that an appointed attorney "shall meet with the child" and that:

"If the attorney determines that the child understands his rights and the child voluntarily and knowingly desires to remain as a patient . . . , the attorney shall so certify . . ."

The 12/18/02 Appointment was faxed to Respondent and received by him that day.

6. Within hours Respondent called the Court Clerk concerning his appointment. He explained that he was scheduled to leave on vacation the next day; he would not return until December 24, 2002, and he could not fulfill the court order. The clerk told him he could give the advise telephonically that day. Respondent stated that he did not fulfill his duties to his paying clients that quickly. Some conversation ensued about how to get the Court to appoint someone else. The Clerk testified that it should be by a "Motion".

7. That same day Respondent filed a Response to Appointment of Counsel ("12/18/02 Response") wherein he explained what is described above and stated "Mr. Klein-smith requests the Court to Appoint someone else." This Response was faxed and filed with the Court.

8. Respondent went on his vacation, believing that because of his 12/18/02 Response another attorney would be appointed. According to the Court Clerk, the filing clerks are trained to only bring a Motion to Appoint a Substitute Attorney to her attention. Consequently, the 12/18/02 Response was not brought to her attention and another attorney was not appointed.

9. After two or three calls to the Court Clerk by the institution at which the child was housed that no attorney had advised the child, the Court Clerk appointed another attorney who did advise the child.

10. Again, not being aware of the 12/18/02 Response, the Clerk on January 22, 2003 prepared a separate non-verified Order to Show Cause Why Party Should Not Be Held in Contempt (Case No. MS 2003-2-II) ("1/22/03 Order"). Judge Rich signed it and it was faxed and received by the Respondent.

11. On January 29, 2003 Respondent filed his Response to the Order to Show Cause ("1/29/03 Response") alleging he was not in contempt for the reasons stated in paragraphs 7 & 8 above and that the Administrative Order and the 12/18/02 Order forced him to practice in areas of law in which he was not competent. It also alleged that these orders were unconstitutional under New Mexico Constitutional provisions under which only the New Mexico Supreme Court had the power to regulate inferior courts and attorneys. It also alleged that these orders were

unconstitutional under the United States Constitution as violations of the prohibition against involuntary servitude. At the March 19, 2003, hearing the constitutional bases of equal protection, due process, interstate commerce and privileges and immunities were added. The right to have this matter heard by an impartial judge was also urged and that Judge Rich should disqualify himself was asserted. The 1/29/03 Response also requested that Judge Rich and all judges of this district be disqualified as not impartial judges because those judges, particularly, Judge Rich, created the Administrative Order and, therefore, as its proponents are Respondent's adversary. Specifically, these judges, especially Judge Rich, are the partial advocates of the Administrative Order, the 12/18/02 Order and the 1/23/03 Order. Therefore, none of them, and especially Judge Rich, can be an impartial judge concerning them.

12. At the same time (1/29/03), Respondent filed a Petition for Prohibition alleging these same grounds to the New Mexico Supreme Court. On February 10, 2003 that petition was denied without comment.

13. The partiality of Judge Rich is evidenced by his attorney's attempt to compromise this matter (See Respondent's Affidavit).

14. On March 19, 2003, this hearing was held. At the outset, Respondent renewed his Motion to disqualify Judge Rich and his fellow judges. Without ruling on this Motion, the hearing proceeded. At the conclusion, Judge Rich ordered each attorney to prepare proposed Findings of Fact, Conclusions of Law and Judgment.

B. Conclusions of Law

1. The Administrative Order and these proceedings violate state law and are unlawful in the following particulars:

(a) Section 3, Article 6 of the New Mexico Constitution because the judges of this Court, particularly, Judge Rich, had no authority to enact it. More specifically, the Administrative Order and these proceedings usurp powers held only by the New Mexico Supreme Court. Particularly, the Administrative Order and these proceedings are: based on the Administrative Order which is: a local rule not approved by the New Mexico Supreme Court (Rule 1-083NMRA); a regulation of the practice of law which is the exclusive domain of the New Mexico Supreme Court (Rules for Admission to Bar), and a form of discipline which is also the domain of the Court (Discipline Rules).

(b) It assumes that attorneys must do pro bono work and attorneys can be compelled by any court to do pro bono work. This is flatly contradictory to Rule 16-602 (See below).

(c) Assuming (without agreeing) that those judges of this Court, particularly, Judge Rich, had the authority to enact the Administrative Order, it is unlawful because it contradicts other professional duties of lawyers. First, it mandates that attorneys do pro bono work when Rule 16-602 Rules of Professional Conduct only exhorts pro bono work and makes it purely voluntary. Secondly, contrary to Rule 16-101, 16-104B, 16-601 and 16-602, Rules of Professional Conduct, it requires lawyers: (i) to practice in areas in which they are not competent; (ii) to incur unreasonable financial costs; (iii) to possibly represent

persons and causes which may be repugnant to the lawyer, and; (iv) does not give any attorney who does not wish to do pro bono work an alternative to fulfilling this alleged legal duty.

The facts clearly show that Respondent: (i) is not competent in child mental health law; (ii) cannot fulfill his duty to "meet" with and determine the child's understanding of his rights (there can be no substitute for face-to-face contact in making this determination); (iii) cannot comply without incurring substantial expense (an over 600 mile drive over probably 2 days, at the least), and; (iv) is given no alternative of performing his alleged pro bono duty.

(c) The facts establish that several elements of Contempt have not been fulfilled (See Article at Rule 5-902, NMRA), to wit:

- (i) the alleged contemnor must have violated a lawful court order (assumed throughout Article);
- (ii) the contempt proceedings must be initiated by verified motion (Part III third paragraph);
- (iii) the alleged contemnor must have the ability to comply and intend to violate the lawful order (Part II);
- (iv) the alleged contemnor must be given the right to trial by jury (Part III "Right to Trial by Jury");
- (v) the alleged contemnor must be given a trial before an impartial judge (Part III, Disqualification of Judge and Mandatory Recusal of Judge).

Here, the proceeding and following parts of these Conclusions of Law demonstrate that the Administrative Order and the 12/18/02 Order are not lawful, Finding of Fact #10

clearly demonstrates that these proceedings were initiated without a verified Motion. Respondent's practical inability to take at least two days to travel from Colorado Springs to Gallup, New Mexico (600 miles+) to have a meaningful discussion with the child so that Respondent could make legitimate and meaningful recommendations to the court is demonstrated by Facts #4 and 5 above. The Respondent believed he had done what was necessary to be excused from the appointment and he would have been if the Clerk had read his 12/18/02 Response. There is no intent or willful violation.

No right to a jury trial was extended to the Respondent. Finally, that Judge Rich is not an impartial judge (See Facts #11 and 12 above) is obvious. He did not disqualify himself when requested. His failure to disqualify and denial of a jury trial compound the unfairness of the March 19, 2003 hearing. The absence of these elements also constitute a violation of the Respondent's Federal Rights (See below).

1. The Administrative Order and these proceedings violate the United States Constitution in the following particulars:

(a) As demonstrated in B. 1. (c) above, the judges of this Court, particularly, Judge Rich, are not impartial. Therefore, that Judge Rich is to decide this matter violates Respondent's right to an impartial judge guaranteed to him by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct 2528, 2534, 153 L.Ed2d 694 (2002). See particularly Part III, A and the other cases cited there).

(b) They compel or force Respondent to work or perform services against his will, This is a violation of Respondent's Constitutional right not to be involuntarily enslaved under the Thirteenth Amendment to the United States Constitution.

(c) It is obvious that if every district court in New Mexico adopted its own "administrative order", an attorney like Respondent would find himself doing nothing but pro bono work in New Mexico's 30+ counties. If an attorney is licensed in more than one state, as Respondent is, the time devoted to pro bono work would geometrically progress until he has nothing to do but pro bono work. This means of implementing the alleged duty or object of pro bono is totally unreasonable, especially when less restrictive methods are considered (e.g. contributions to charity, etc.) and when they are considered, it is not suitably tailored to meet a lawful, legitimate, substantial or compelling state interest. Therefore, the Administrative Order and these proceedings violate Respondent's rights to equal protection and due process of the law, to engage in interstate commerce, and to be treated on the same basis as New Mexico residents under the Fourteenth Amendment to the United States Constitution, the Commerce Clause thereof (Section 8, Article I) and the Privileges and Immunities Clause thereof (Section 2(1) and Article I Amendment XIV) and the case law interpreting those provisions (*Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *Shaw v. Reno*, 509 U.S. 432, 113 S. Ct. 2816, 125 L. Ed.2d 511(1993); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct 2562, 49 L. Ed 2d 520 (1976); *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct 1153, 25 L.Ed 2d 491

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(1970); *Schweiker v. Wilson*, 450 U.S. 221, 101 S. Ct 1074, 67 L.Ed 2d 186 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct, 453, 66 L. Ed 2d 368 (1980); *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 453, 59 L. Ed. 2d 171 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed.2d 511 (1976); *Frazier v. Heebe*, 462 U.S. 641, 649, 107 S. Ct 2607, 2613, 96 L.Ed.2d 557 (1987); *Tolchin v. Supreme Court of the State of New Jersey*, 111 F 3rd 1099 (1997); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S. Ct. 1272, 84 L.Ed 2d 205 (1984)).

C. Judgment

Based on all of the foregoing, the Court dismisses with prejudice, discharges and holds for naught its 1/22/03 Order.

District Judge

11th JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

In the Matter of
Philip M. Kleinsmith

No. MS 2003-2-II

Affidavit of
Philip M. Kleinsmith

The undersigned, being sworn upon his oath states the following on his own personal knowledge:

1. I am licensed to practice law in twenty-four states (AK, AZ, CO, ID, FL, KY, KS, LA, MD, MO, MT, NM, ND, NE, OK, OR, SD, TN, TX, UT, WA, WI, WY)

2. My practice is limited to real estate foreclosures and related matters in all of those states. As such, I do more than two foreclosures in many counties in those states. In New Mexico, this is true in at least 10 counties.

3. I have not practiced in other areas, including mental health, for over ten years. I do not wish to practice in other areas.

4. My only office and residence is in Colorado Springs, Colorado.

5. Attached hereto is the typewritten draft of a proposed order to settle this matter submitted to me by the Assistant Attorney General. Handwritten thereon is how I proposed to modify that order to settle this matter.

/s/ Philip M. Kleinsmith
Philip M. Kleinsmith

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Acknowledged, subscribed and sworn to as true before me by Philip M. Kleinsmith at Colorado Springs, Colorado on the 3rd day of April, 2003. Witness my hand and official seal.

/s/ Susan Grange
Notary Public

(SEAL) SUSAN GRANGE
NOTARY PUBLIC,
STATE OF COLORADO

**My Commission Expires
10/35/2004**

11th JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF MCKINLEY

In the Matter of Phillip Kleinsmith

- No. MS 2003-2-II

**STATE'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

THIS MATTER having come before the Court upon its order to show cause, the Court holding a telephonic hearing with the State represented by Michael R. Jones, Assistant Attorney General, and Phillip Kleinsmith representing himself, the State presents the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The State called as witnesses Francisca Palochak, Chief Deputy Clerk of the Eleventh District Court and Genard Bitsely of the Rehoboth McKinley Christian Health Care Services (RMCH).
2. On October 28, 2002, the Eleventh District Court entered an administrative order that all lawyers licensed to practice law in New Mexico and having listed as counsel in three or more cases in McKinley County within a twelve month period would be considered to be in a position to participate in the Court's program of appointments in pro bono cases. This order was filed as CV 2002-2-II. Appointments of lawyers under this order were to occur at a random and fair manner to all attorneys practicing law in McKinley County. (A copy of the Order was entered into evidence on March 19, 2003)

3. On December 16, 2002, a mental health Program Petition was filed in the 11th Judicial District Court pursuant to the Children's Mental Health and Developmental Disabilities Act, NMSA 1978, Sections 32A-6-1 *et seq.* seeking appointment of an attorney for a minor child who had been admitted for psychiatric treatment at RMCH (A copy of the Petition was entered into evidence on March 19, 2003)

4. Following the District Court's receipt of the Petition the Court's Chief Deputy Clerk, Francisca Palochak, reviewed the Court's appointment list and saw that Petitioner Philip M. Kleinsmith was the next attorney on the rotation to receive a Court appointment. She then prepared an Appointment of Counsel appointing Mr. Kleinsmith to represent the child and forwarded it to the Court.

5. The December 16th appointment followed the edicts of the Court's October 28th administrative order. Mr. Kleinsmith had entered as counsel on at least three cases in McKinley County in the prior twelve month period before December 16th.

6. On December 18, 2002, the Honorable Joseph L. Rich signed and entered the Appointment of Counsel appointing Petitioner to represent the child. Both the Appointment of Counsel and the Program Petition were faxed to Petitioner at his office.

7. On December 19, 2002, Mr. Kleinsmith telephoned Ms. Palochak and told her that he could not represent the child as he was going on vacation the next day and would not return until December 26, 2002.

8. Ms. Palochak suggested to Mr. Kleinsmith that he contact RCMH Behavioral Health and conduct the interview with the child over the telephone. Mr. Kleinsmith responded by stating that, "I don't even give service that fast to my paying clients."

9. When Mr. Kleinsmith continued to tell Ms. Palochak why he should be relieved of the Appointment, Ms. Palochak explained that she did not have the authority to relieve him of the Appointment, and she suggested that he file a motion and proposed order to withdraw and fax the documents to the Court.

10. Later on December 19, 2002, Mr. Kleinsmith faxed a document entitled "Response to Appointment of Counsel" to the Court. This response was not a motion and proposed order as requested by Ms. Palochak. (A Copy of this "Response" was entered into evidence on March 19, 2003)

11. Mr. Kleinsmith did not contact the Court to find out whether the Court had relieved him of the Appointment.

12. During the week of December 30, 2002, Ms. Palochak received a telephone call from Mr. Genard Bitsely at RMCH stating that the child wanted to speak with her attorney and asking who the attorney was for the child. Ms. Palochak gave Mr. Bitsely Mr. Kleinsmith's name and telephone number.

13. Mr. Bitsely attempted to contact Mr. Kleinsmith several times and left his number at Mr. Kleinsmith's office, but was never able to speak with Mr. Kleinsmith.

14. On January 13, 2003, Ms. Palochak received another telephone call from RMCH advising her that the child had not yet spoken with her attorney despite numerous attempts

by RMCH to contact Mr. Kleinsmith, and that the child was demanding to speak with an attorney.

15. Ms. Palochak the prepared an Amended Appointment of Counsel and informed the Court of what had happened. On January 13, 2003, Judge Rich appointed another attorney, Bradley L. Keeler, to represent the child.

16. On January 22, 2003, the Court issued an Order to Show Cause why Mr. Kleinsmith should not be held in contempt for failing to comply with the Appointment of Counsel or meet with the child as directed by the Court.

17. On January 24, 2003, the Court entered an Order disposing of the Children's Mental Health Act matter.

CONCLUSIONS OF LAW

1. The Administrative Order entered by the Court on October 28, 2002 was a valid court order allowing for appointment of attorneys practicing in McKinley County to be appointed to pro bona cases.
2. Mr. Kleinsmith was appointed to a pro bono case pursuant to this order.
3. Upon learning of his appointment, Mr. Kleinsmith contacted the District Court and was informed that he would need to file a motion and order to withdraw his appointment.
4. Instead of filing the required motion and order, Mr. Kleinsmith filed a letter entitled "Response to Appointment of Counsel".
5. Mr. Kleinsmith's "Response" did not meet the Court's standards for withdrawal from a case.

6. Mr. Kleinsmith's inadequate "Response" and his not checking with the Court to see if he was still on the case prolonged the time that the child had wait to be reviewed by counsel.
7. The original appointment was on December 18, 2003. The courts secondary appointment was made on January 13, 2003. The child's file was closed on January 24, 2003.
8. Mr. Kleinsmith's failure to follow a court order lengthed an action that ultimately took 11 days. (The amount of time from second counsel's appointment to closure of the case) The delay caused by Mr. Kleinsmith was twenty five days.
9. Mr. Kleinsmith's failure to heed a court appointment or to take appropriate action to resolve the matter is found to be in contempt of court.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Phillip Kleinsmith is found to be in contempt of Court by failing to follow the order of this court. Mr. Kleinsmith ordered to pay a fine of \$500 to the District Court within 20 days of this ruling.

JOSEPH L. RICH
DISTRICT JUDGE

Proposed By:

/s/ Michael R. Jones

Michael R. Jones
Assistant Attorney General

PARTIES OF RECORD:

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Court of Appeals
State of New Mexico

Case No. 23,999

Philip M. Kleinsmith,
Respondent-Appellant

and

Joseph L. Rich,
Judge-Appellee

Appeal From McKinley County New Mexico,
Judge Joseph L. Rich presiding

Appellant's Brief in Chief

Submitted By: Kleinsmith and Associates, P.C.
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1. Summary of Proceedings

a. Nature of Case

This is an indirect non-summary criminal contempt case.

b. Course of Proceedings

On October 23, 2002, District Court Judge Joseph L. Rich entered an Administrative Order (hereinafter "Administrative Order" RP 9-11) concerning the appointment of attorneys on a pro bono basis. Pursuant to the Administrative Order and the Child Mental Health Statute (NMSA 36 A-6-1ff) on December 18, 2002, Judge Rich appointed Philip M. Kleinsmith (hereinafter "Appointment Order") and Mr. Kleinsmith responded (hereinafter "Appointment Response") thereto (RP 12,13 & 20; Cassette Log #395-0601). In January, 2003, an amended order appointing another attorney was entered (RP 21; Cassette Log #0710).

On January 22, 2003, Judge Rich signed an Order to Show Cause Why Mr. Kleinsmith Should Not Be Held in Contempt (RP 14; hereinafter "Contempt Citation"). Mr. Kleinsmith filed a written Response (hereinafter "Contempt Response") thereto on January 29, 2003 (RP 15,16). That Response had attached to it a copy of Mr. Kleinsmith's Petition for Writ of Prohibition and Request to Stay which was filed with the New Mexico Supreme Court on January 30, 2003. (New Mexico Supreme Court Case No. 27,894). On February 10, 2003, that Petition was denied.

c. Trial Court Disposition

On March 19, 2003, the contempt hearing (hereinafter "Contempt Hearing" was held (RP 19-23) and on April 15, 2003, Judge Rich entered a contempt order (hereinafter "Contempt Order") against Mr. Kleinsmith (RP 46-50). A Notice of Appeal was filed on May, 13, 2003 (RP 52-54). Hereinafter, the Contempt Citation, Contempt Response,

the Contempt Hearing and the Contempt Order will be call the "Contempt Proceedings".

d. Summary of Facts

Without any known notice to the attorneys to be affected thereby and without the approval of the New Mexico Supreme Court apparently the Trial Court and all of its judges (i.e. judges of 11th Judicial District) on October 23, 2002, adopted the Administrative Order. "Apparently", because it does not state who approved or disapproved it. It is only signed by Judge Rich. It states its purpose to be "... to develop an effective and fair system for pro bono appointments ..." and:

3. That all lawyers providing legal services in McKinley County or holding themselves out as providing legal services in McKinley County, do so as a privilege granted to them by the State. As such, the State can condition those lawyers' ability to practice law upon the acceptance of certain responsibilities in the furtherance of the administration of justice. Courts have long recognized this principle.

4. The obligations of the legal profession to serve indigent clients on court order is an ancient and established tradition.

5. Given statutory restrictions and obligations of the District Attorney's Office, of the Eleventh Judicial District, Division II, special consideration must be given to how attorneys in that office will fulfill their pro bono obligations." (RP 9)

As to the exempted District Attorneys, it provides:

"The District Attorney should meet annually with the McKinley County District Court judges to discuss how lawyers in the District Attorneys Office will fulfill their pro bono obligation." (RP 11)

The Administrative Order provides no similar alternative for lawyers who wish to fulfill their alleged pro bono obligations in other ways (e.g. charitable contribution) as apparently district attorneys may do (RP 9-11).

The Administrative Order prescribes that *any* attorney or law firm who is involved in more than two cases in any twelve months in the McKinley County Courts shall be appointed on a rotating basis "... where appointment of counsel is deemed necessary by the court, ..." (RP 10). The Administrative Order makes no provisions on how an attorney can be excused from a particular appointment.

The Respondent is an attorney whose practice is limited to real estate foreclosures and related matters in twenty-four states where he is licensed. This includes filing more than two foreclosures per year in more than ten New Mexico counties per year. The same is true in many other states. He has not practiced in the mental health area for over ten years. He does not wish to practice in that area. Respondent's only residence and only office are in Colorado Springs, Colorado, at least 300 miles from Gallup, New Mexico, the location of the 11th Judicial District Court. (RP 43)

On December 18, 2002, Judge Rich signed the Appointment Order (RP 14) wherein he, pursuant to Child Mental Health Statute, 32A-6-12G, I & J NMSA, and the Administrative Order appointed Mr. Kleinsmith to fulfill

certain statutory duties pursuant to that statute. Those statutes direct that the appointed attorney meet with the child, advise the child of certain legal rights, and make a report to the Court concerning the child's competency. Those statutes do not state that an attorney can be appointed against his will.

The Appointment Order was faxed to Mr. Kleinsmith and received (RP 12-13). Within hours Mr. Kleinsmith called the Court Clerk concerning his appointment. He explained that he was scheduled to leave on vacation the next day; he would not return until December 24, 2002, and he could not fulfill the court order. A conversation ensued about how to get the Court to appoint someone else. The Clerk testified that it should be by a "Motion to Withdraw and Order". (Cassette Log #0335-0539; RP 20)

That same day Mr. Kleinsmith filed his Appointment Response wherein he explained what is described above and stated "Mr. Kleinsmith requests the Court to appoint someone else." This Appointment Response was faxed and filed with the Court. (ibid).

Mr. Kleinsmith went on his vacation, believing that because of his Appointment Response another attorney would be appointed (RP 15). According to the Court Clerk, the filing clerks were trained to only bring a Motion to Appoint a Substitute Attorney to her attention. Consequently, the Appointment Response was not brought to her attention and another attorney was not appointed. (Cassette Log # 0539; RP 21,22).

The Clerk's testimony was:

"PHILIP KLEINSMITH: Excuse me, um I forget the Exhibit number but its the response to

appointment of counsel. Do you have that before you?

MISS PALACHEK: Yes Sir, state's Exhibit 1.

PHILIP KLEINSMITH: Ok. Ah does it say in the final sentence of that paragraph, "Mr. Kleinsmith requests the court to appoint someone else"?

MISS PALACHEK: Yes.

PHILIP KLEINSMITH: Does it not explain that I would be absent from the 19th thru the 24th?

MISS PALACHEK: It does.

PHILIP KLEINSMITH: I'm sorry.

MISS PALACHEK: It does say that yes.

PHILIP KLEINSMITH: Ok so in substance would you agree that this is as you call it a motion to be excused or whatever terminology you wish to use?

MISS PALACHEK: Uh, I would not and neither would the docket clerk. I did not see this document. When it was filed, the docket clerk docketed it and they are not taught to send up responses, that's not considered something the judge would see, they send up motions.

PHILIP KLEINSMITH: So you're saying this whole thing has come about because the wrong label was used?

MISS PALACHEK: Well its not a motion and that's what we are accustomed to. . . .

PHILIP KLEINSMITH: Is that ma'am I asked you whether or not this whole thing had come about because an improper label was affixed to something.

MISS PALACHEK: No I believe . . . because an order was not entered excusing you from . . .

PHILIP KLEINSMITH: I didn't ask you that.

PHILIP KLEINSMITH: Your Honor I ask the Court to direct the witness to answer the question. And the question is: Is not the response ask for someone else to be appointed?

MISS PALACHEK: Yes it does.

PHILIP KLEINSMITH: And because the label, Motion to Appoint somebody else or whatever you wished was not used that has precipitated the course of events? Is that correct?

MISS PALACHEK: No that is not correct it's not the label I wish, Sir it's what's customarily filed in this court.

PHILIP KLEINSMITH: I didn't ask you ma'am what you want your

MISS PALACHEK: My answer is No Mr. Klein-smith. The answer is No.

PHILIP KLEINSMITH: But do you agree that a response to appoint someone else is contained within that response?

MISS PALACHEK: Yes.

After two or three calls to the Court Clerk by the institution at which the child was housed that no attorney had advised the child, the Court Clerk appointed another

attorney who did advise the child. (Cassette Log #0905-1145; RP 22).

Again, not being aware of the Appointment Response, the Clerk on January 22, 2003 prepared the Contempt Citation. Judge Rich signed it and it was faxed and received by Mr. Kleinsmith (Cassette Log # 0690-710; RP 21; RP 15).

On January 29, 2003 Mr. Kleinsmith filed his Contempt Response to the Contempt Citation alleging he was not in contempt for the reasons stated above and that the Administrative Order and the Appointment Order forced him to practice in areas of law in which he was not competent. By attaching the Petition for Prohibition, it also alleged that these orders were unconstitutional under New Mexico Constitutional provisions under which only the New Mexico Supreme Court had the power to regulate inferior courts and attorneys. It also alleged that these orders were unconstitutional under the United States Constitution as violations of the prohibition against involuntary servitude.

At the same time, Mr. Kleinsmith filed a Petition for Prohibition alleging these same grounds to the New Mexico Supreme Court. On February 10, 2003 that petition was denied without comment.

At the March 19, 2003, hearing, the constitutional bases of equal protection, due process, interstate commerce and privileges and immunities were added. The right to have this matter heard by an impartial judge was also urged and that Judge Rich should disqualify himself was asserted. The Contempt Response also requested that Judge Rich and all judges of his district be disqualified as not being impartial judges because those judges, particularly, Judge Rich, created the Administrative Order and,

therefore, as its proponents were Mr. Kleinsmith's adversary. Specifically, these judges, especially Judge Rich, were the partial advocates of the Administrative Order, the Appointment Order and the Contempt Order. That Judge Rich was acting as both judge and advocate is demonstrated by he and his attorney's attempts to compromise the matter (RP 43,44).

On March 19, 2003, the Contempt Hearing was held. At the outset, Mr. Kleinsmith renewed all of his objections to the proceedings. Without ruling on these objections, the hearing proceeded (Cassette Log # 070-0322). At the conclusion, Judge Rich ordered each attorney to prepare proposed Findings of Fact, Conclusions of Law and Judgment (RP 26-45).

On April 15, 2003, Judge Rich found Respondent in contempt and fined him \$500.00 (RP 46-50) .

2. Arguments

a. First Issue: Were Required Elements of Contempt Proven?

(i) Standard of Review

An article at Rule 5 - 902, NMRA, sets out the following as some of the required elements of contempt:

A. Verified Motion. The contempt proceedings must be initiated by a verified motion (Part III, third paragraph of article;

B. Ability to Comply. The alleged contemnor must have the ability to comply (Part II of article);

C. Intent to Violate. The alleged contemnor must have the intent to violate a lawful order (Part II of article);

D. Impartial Judge. The alleged contemnor must be given a trial before an impartial judge (Part III of article);

E. Lawful Order. A lawful order must be involved (assumed throughout the article).

(ii) How Issue Preserved

Mr. Kleinsmith raised these objections at the beginning of the Contempt Hearing and that he wished to call Judge Rich as a witness (RP 19, 20; Cassette Log # 005-0293).

Judge Rich did not permit oral argument after the Contempt Hearing. He did allow argument by allowing both sides to present what they thought should be the court's Findings of Fact, Conclusions of Law and Judgment. In Mr. Kleinsmith's proposed Findings, Conclusions and Judgment (RP 34-37), he argued that these elements of contempt had not been proven, thus, preserving them for appeal.

(iii) Appellant's Contentions with Attack on Findings

(A) No Verified Motion

The search to find a verified motion as the condition precedent to Judge Rich's Contempt Order (RP 30,31) is in vain. No verified motion exists. Clearly and unequivocally, the New Mexico Supreme Court has held that without a verified motion, the contempt proceedings are fatally

defective (*State v. Clark*, 56 NM 123,241 P2d 328 (1952 Sp. Ct.).

That the requirement of a verified motion is not a mere ritual but has real meaning is clearly demonstrated by the facts of this case. It is self-evident that if the Clerk prepared a verified motion, she would have had to make an allegation that Mr. Kleinsmith had not requested that someone else be appointed which was routinely granted. This would have required her to examine the court file. There she would have found Mr. Kleinsmith's Appointment Response (see pages 3 & 4 above) and the contempt citation would not have been issued.

B. No Ability to Comply

NMSA 36A-6-121's requires that an appointed attorney meet with the child and "determine that the child understands his rights and . . . voluntarily and knowingly desires to remain as a patient". Without considering his ethical duty to be competent (See 2c below), Mr. Kleinsmith did not have the ability to comply with the statute because to comply imposed on him unreasonable, if not, impossible, moral and physical burdens. (*Andrews v. McMahon*, 43 N.M. 87, 85 P. 2d 743 (1938 Sp. Ct.), *Armijo v. Armijo*, 29 NM 15, 217 P 623 (1923 Sp. Ct.), *Sosaya v. Sosaya*, 89 NM 769, 558 P 2d 38 (1977 Sp. Ct.)).

First, the statute presumes that any attorney has the ability to determine the mental capacity of another human being. The presumption is preposterous. In no other type of proceeding involving a human being's mental state with consequences of restrained institutionalization is anyone other than a person with some medical training allowed to make such a judgment. It is self-evident that, at best, only

persons trained in the functioning of the human mind and emotions should be allowed to make such judgments. Maybe attorneys who have specialized in mental health have this ability. Certainly, Mr. Kleinsmith does not. His practice is exclusively devoted to foreclosures and related matters.

Second, the Appointment Order imposed an extremely unreasonable hardship on Mr. Kleinsmith. Specifically, he had two ways to fulfill his court imposed duty for which he was not fit: either he could meet with his client "telephonically" or "in person" (the latter seems to be the statute's intent). Mr. Kleinsmith explained unfitness to make the statutory judgments certainly becomes more questionable when performed via a fifteen to thirty minute phone call. If the client requested an "in person" meeting, Mr. Kleinsmith would have been confronted with approximately a two day eight hundred mile trip to perform duties he is not fit to perform.

C. No Intent to Violate

Mr. Kleinsmith did not intend to disobey the Appointment Order. Although in 1973 the New Mexico Supreme Court declared that intent is not a necessary element of contempt (*Seven Rivers Farm, Inc v. Reynolds*, 84 N.M. 789, 508 P 2d 1276 (1978 Sp. Ct.)), "This rule is contrary to that of a substantial majority of jurisdictions" (cited Article in Part II). Perhaps, it is time for this court to re-visit the issue.

The facts here are compelling evidence for New Mexico to find intent necessary for contempt. Mr. Kleinsmith discussed how not to be appointed in view of his immediate departure on his vacation. Although she

described a "Motion" to appoint another attorney, Mr. Kleinsmith filed a "Response" (the Appointment Response) in which he requested another attorney to be appointed. Unbeknownst to him this insubstantial difference was fatal to him because the deputy court clerks were directed to only bring "Motions" not "Responses" to the Court Clerk's attention. This insubstantial difference brought about the Clerk's preparation of the Contempt Citation of Mr. Kleinsmith apparently without the Court Clerk examining the Court file. This pure fortuity led to Judge Rich citing Mr. Kleinsmith for Contempt when he did not even know about Mr. Kleinsmith's Response. It is absolutely clear that he had no intent to defy the Trial Court. On the contrary, his intent was to obey unofficial procedures to avoid contempt. He merely used the wrong word. There is no finding or conclusion in Judge Rich's Contempt Order (RP 46-51) that Mr. Kleinsmith had an intent to violate the Order Appointing.

D. No Impartial Judge

Although by his Response and at the beginning of the Contempt Hearing, Mr. Kleinsmith requested Judge Rich to disqualify himself as partial. Judge Rich did not rule on the issue and proceeded to ignore and *de facto* deny the request. He ignored and *de facto* denied the request in his Contempt Order by not even addressing the issue of his partiality. In sum, there is only the absence of a finding, ruling or conclusion to attack.

In *Wollen v. State*, 86 N.M. 1,2 578 P 2d 960 & 961 (1971 Sp. Ct.) New Mexico unequivocally adopted the rule that in indirect non-summary criminal contempt cases, the contemnor must be tried before a judge other than the

judge who is the alleged object of the contempt. The Contempt Hearing before Judge Rich clearly violates this rule.

b. Second Issue: Does the Collateral Bar Rule Preclude Respondent from Challenging the Administrative Order?

(i) & (ii) Standard of Review and How Preserved

Neither of these matters are relevant here because they were not argued in the Trial Court. On the other hand, Judge Alarid requested that this issue be addressed in the Notice Assignment to the General Calendar.

(iii) Appellant's Contentions

The rule and its parameters are stated in the causes cited by Judge Alarid:

"Defendant either had to appeal, seek expedited judicial redress or accept the order of the court. He did not have the right simply to ignore the courts ruling; in effect, to become his own judge and jury . . .".

"This affirmance should not, however, be misconstrued as granting undue judicial license in the area of contempt. Courts and commentators have questioned the outer limits of the collateral bar rule. For example, when fundamental constitutional liberties are subject to immediate and irreparable harm, or where alternative avenues of judicial redress are simply not available given the press of time, the collateral bar rule may have to yield. (*State v. Bailey*, 118 N.M. 466, 469, 882 P. 2d 57, 60 (Ct. App 1994))."

"Further, the collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling; in the absence of such an opportunity for review, the [alleged] contemnor may challenge the validity of the disobeyed order "on appeal" (*Pina v. Espinoza*, 130 N.M. 661, 669, 29 P. 3rd 1062, 1070 (N.M. Ct. App. 2001 citing *In Re Novak*, 942 F. 2d 1397, (11th Cir 1991)).

Here, none of these requirements that the Collateral Bar Rule be applied are present. This case does involve fundamental constitutional rights: Impartial judge (2a (iii)(D) above), usurpation of New Mexico Supreme Court's exclusive right to adopt rules (2c below); involuntary servitude, equal protection and due process, privileges and immunities, and interstate commerce (2e below). All of these rights were subject to immediate and irreparable harm in this case. The alternative avenue of judicial redress was not available because Judge Rich appointed Mr. Kleinsmith within 45 days of adopting his constitutionally infirm Administrative Order which was neither published before or after its adoption. Assuming that through some miracle, Mr. Kleinsmith had become immediately aware of the Administrative Order, his suit to permanently enjoin it would barely have been underway. Moreover, in view of Judge Rich's deaf ear to remove himself (See 2a (iii)(D) above), it stretches credulity that he would have temporarily enjoined his own Administrative Order or disqualified himself. Consequently, even assuming great alacrity by Mr. Kleinsmith, it is very reasonable to conclude that Judge Rich would not have yielded. Most importantly, the only other avenue open to Mr. Kleinsmith, a Writ of Prohibition was denied by the New Mexico Supreme Court.

c. Third Issue: Are the Contempt Proceedings and the Appointment Order Void Because the Administrative Order is Unconstitutional Under Article VI, Section 3 of the New Mexico Constitution?

(i) Standard of Review

The constitutional provisions and the rules cited in (iii) immediately below are the standards of review.

(ii) How Issue Preserved

Mr. Kleinsmith objected and made motions, Judge Rich turned a deaf ear. Mr. Kleinsmith urged the same objections via his proposed Findings of Facts, Conclusions of Law and Judgment. Judge Rich ignored them (See 2a (ii) and 2a (iii) D above).

(iii) Appellant's Contentions with Attack on Findings

Section 3, Article VI of the New Mexico Constitution provides that only the New Mexico Supreme Court "... shall have superintending control over all inferior courts". The New Mexico Supreme Court has exercised this exclusive power by its rule on Local Rules (Rule 1-083 NMRA) which requires local rules to be approved by it. The Administrative Order has not been so approved.

This constitutionally exclusive power includes the power to license and regulate attorneys (See New Mexico Supreme Court rules on Admission to Bar, Professional Conduct, Discipline, Legal Education and Specialization). Rule 16-101 of the Rules of Professional Conduct states:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Also see 16-104 B).

Rule 16-601 and 16-602 of those rules state:

"A lawyer should *aspire* to render at least fifty (50) hours of *pro bono publico* legal services per year. . . ."

"A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- A. representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- B. representing the client is likely to result in an unreasonable financial burden on the lawyer, or
- C. the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."

The Administrative Order prescribes that any attorney or law firm who is involved in more than two cases in any twelve months in the McKinley County courts shall be appointed on a rotating basis " . . . where appointment of counsel is deemed necessary by the court, . . . " Mr. Kleinsmith fulfilled this requirement. He has not practiced in the mental health area for over ten years. He does not wish to practice in that area. Mr. Kleinsmith's only residence

and only office are in Colorado Springs, Colorado, at least 300 miles from this court.(See page 3 above).

The Administrative Order is clearly an usurpation of the New Mexico Supreme Court's exclusive power to adopt and/or approve local rules. Any argument that any "administrative rule" is not the type of rule in the Supreme Court's exclusive domain makes a mockery of these constitutional provisions. The reason is simple: what is regulated or not regulated by the Supreme Court is a word game. In any measure of the exclusive domain of the Supreme Court, the Administrative Order is illegal and unconstitutional.

Although the Administrative Order is not a procedural rule, it certainly has serious impact on lawyers considered McKinley County attorneys. The Administrative Order effectively requires every McKinley County attorney to acquire that competency because, wilylily, Judge Rich will force them to make this judgment by appointing them pursuant to the Administrative Order. Put differently, the Administrative Order requires every McKinley County attorney to be competent in any area of the law Judge Rich appoints an attorney to act. Judge Rich wields a bigger stick than the New Mexico Supreme Court. If you are found to have committed gregious enough acts, the New Mexico Supreme Court can only disbar an attorney. If you do not obey Judge Rich's orders pursuant to the Administrative Order, you can be fined and/or imprisoned which, in turn, could lead to disbarment. The whole point is that Judge Rich has usurped the New Mexico Supreme Court's exclusive power to establish level of competency of McKinley County attorneys. Shortly reflection tells us all that if McKinley County can set its

standard, every other county or district must have the same power. The result would be chaos.

d. Fourth Issue: Are the Contempt Proceedings and the Appointment Order Void Because the Administrative Order is Unconstitutional Under the Thirteenth Amendment of the United States Constitution?

(i) Standard of Review

The constitutional provisions cited in (iii) immediately below are the standards of review.

(ii) How Issue Preserved

The statements in 2c(ii) are equally applicable here.

(iii) Appellant's Contentions with Attack on Findings

"... we hold that, ..., the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by use or threat of physical restraint or physical injury or the use or threat of coercion through law or the legal process." *U.S. v. Kozminski*, 487 U.S. 931, 952 108 S. Ct. 2751, 2765, 101 L. Ed 2nd 788(1988).

The same case states that there are exceptions to this rule:

"... the Thirteenth Amendment was not intended to apply to 'exceptional' cases well established in the common law at the time of the Thirteenth Amendment. ..." (ibid., p. 944 [U. S.], p. 2760 [S. Ct]).

"It is nonetheless significant that no reported decision exists in the above states (NM included) prior to 1892 holding that a lawyer could not decline representation without compensation . . . English precedents from the 15th to the late 19th century, on which the states apparently relied and which Congress might have had in mind, were equally murky. . . . Again, no reported decisions involve the imposition of sanctions on lawyers unwilling to serve". See Shapiro, Enigma of Lawyers Duty to Serve, 55 NYU Law Review 735,740. Professor Shapiro concludes: "To justify coerced, uncompensated legal service on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there."

(Again citing Shapiro) "In view of the complete absence of precedent evincing state courts' power to sanction attorneys unwilling to provide free representation, the dissents surmise that congress meant to grant this power to federal judges, and indeed to confer on them as much authority as judges of the 'most progressive' states exercised seems somewhat extravagant." (*Mallard v. U.S. Dist. Ct. for Southern Dist of Iowa*, 490 U.S. 296, 303, 109 S. Ct. 1814, 1819 (1989)).

In *Mallard*, Justice Brennan specifically ruled that he was not addressing whether any court had the inherent power to force attorneys to represent any litigant. He let that issue to another day. Nonetheless, his above analysis and conclusion that English and American courts did not have a firm tradition of coerced, uncompensated legal service before 1892 is strong evidence that such coerced legal services were not "exceptional" cases "well established in

the common law at the time, of the Thirteenth Amendment" (See Kozminski above).

Contrary to the fact that such forced legal services are not "an ancient and established tradition". Judge Rich's Administrative Order so finds. With equal erroneousness, Judge Rich's Contempt Order concludes that the Administrative Order was a valid court order for forced legal services by attorneys "to be appointed to pro bono cases" and that on that basis, Mr. Kleinsmith was appointed by Judge Rich's Appointment Order. As has been demonstrated, this premise of Judge Rich's actions is false and unlawful. Therefore, the Administrative Order and all its progeny are unlawful.

e. Fifth Issue: Are the Contempt Proceedings and the Appointment Order Void Because the Administrative Order is Unconstitutional Under the Following Provisions of the U.S. Constitution: Due Process and Equal Protection (14th Amendment); Interstate Commerce (Article I, § 8), and Privileges and Immunities (Article VI, § 2(i) and 14th Amendment)

(i) Standard of Review

The constitutional provisions cited in (iii) immediately below are the standards of review.

(ii) How Issue Preserved

The statements in 2c(ii) are equally applicable here.

(iii) Appellant's Contentions with Attack on Findings

(A) No Due Process

The law cited in 2 a(iii)(D) above clearly states that an impartial judge is a requirement of due process under the United States Constitution (14th Amendment, Section 1). Although the Federal courts have adopted a subjective test ("judicial embroilment" *ibid.*), New Mexico has adopted an objective test that in indirect non-summary criminal contempt cases – the case here:

"... a person accused of contempt by a trial judge should be tried before a different judge one not involved in the subject matter of the contempt or in the citation of the contemnor."

(B) No Equal Protection

The United States Supreme Court has ruled unconstitutional laws which treat unequally or differently persons of a certain trait with regard to rights when the trait is not suspect and the right is not fundamental (*Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991) involving age/state judgeships; *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L.Ed. 2d 511 (1993) involving redistricting; *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985), involving mental retardation/housing; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed 2d 520 (1976), involving age/policeman's employment). Assuming these conditions, the question is: Is the discrimination rational? The rationality of the discrimination must not be perfect, but, it must have some rationality in both its *purpose and means* (*Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25

L.Ed 2d 491 (1970), *Schweiker v. Wilson*, 450 U.S. 221, 101 S. Ct. 1074, 67 L.Ed 2d 186 (1981), *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S. Ct., 453, 66 L. Ed 2d 368 (1980); *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 453, 59 L. Ed. 2d 171 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed.2d 511 (1976)).

In this case, the object or alleged *purpose*, of the Administrative Order is "... to provide pro bono services ... in a random, fair and reasonable fashion. ..." This is a rational purpose assuming that the Administrative Order is a lawful order. The two previous arguments demonstrate that it is not. Nonetheless, for purposes of this argument, it will be presumed to be a lawful order.

The *means* adopted is not rational. The Administrative Order's means is not rational because it exempts district attorneys from certain appointments and allows them to "fulfill their pro bono obligations" in other ways. If their exception is rational, it is equally rational for other attorneys to be exempt for a myriad of excuses. Nonetheless, those other attorneys will only be excused if they have a conflict and follow unpublished procedures established by the Court Clerk. Obviously, this is unequal treatment from the automatic exemption for district attorneys. Also, the Court Clerk's rules apply to things other than "conflicts". The inequality of the Administrative Order under "equal protection" under the Federal Constitution is also unconstitutional under the New Mexico Constitution (See 2 c above) because to be excused from serving under it, one must follow secret rules adopted by a court clerk, not adopted or approved by the New Mexico Supreme Court.

Secondly, the Administrative Order creates inequality for attorneys who practice law in McKinley County versus attorneys who practice elsewhere in New Mexico. In other words, attorneys who practice only in Bernalillo County are not affected by the Administrative Order while attorneys who practice in McKinley County are affected thereby. The result is that McKinley County attorneys are burdened unequally to Bernalillo county attorneys, both being United States and New Mexico citizens.

Is this a denial of Equal Protection? Again, although the Administrative Order's purpose will be presumed to be rational, its means is not. If every district court in New Mexico adopted its own "administrative order"; an attorney like Mr. Kleinsmith might well find himself doing nothing but pro bono work in New Mexico's 30+ counties. This is chaos and is unequal.

C. Unconstitutionality Affects Interstate Commerce

As articulated in (*Tolchin v. Supreme Court of the State of New Jersey*, 111 F 3rd 1099. 1105ff (1997), the Commerce Clause (Article 1 §8) provides limitations on the restrictions a state can impose on interstate commerce, which includes the practice of law. Here, the test is a balancing test between interstate or local interests and whether the state law is excessive. If the law is not neutral in effect it is unconstitutional. The immediately preceding paragraph clearly demonstrate that the Administrative Order is excessive and not neutral. When applied to an attorney like Mr. Kleinsmith who is engaged in interstate commerce, it is excessive and not neutral. If every county of every state adopted an "administrative order" the pro bono work imposed on Mr. Kleinsmith would require him

to set up a non-profit law firm whose sole source of income would be Mr. Kleinsmith's personal funds. The Administrative Order is indisputably an excessive and non-neutral restriction of interstate commerce.

D. Unconstitutionality Affects Privileges and Immunities

The United States Supreme Court has held that the purpose of the Privileges and Immunities Clause of the United States Constitution (Article IV, Section 2) is to fuse into one Nation a collection of independent, sovereign States. It has also held that it protects only fundamental rights which includes the practice of law. Finally, it has held that it does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective, considering the availability of less restrictive means. (*Supreme Court of New Hampshire v. Piper*, 470 U. S. 274, 279-289, 105 S. Ct., 1272, 84 L.Ed.2d. 205 (1985)).

The argument under Privileges and Immunities is basically the same as the argument under the Interstate Commerce clause (See previous sub-section). In other words, if it is assumed that legally every county in the land may adopt its own "administrative order", and that there is a substantial reason for the difference in treatment (i.e. legal services for the poor), the discrimination against non-resident attorneys does not bear a substantial relationship to the State's (here County's) objective considering the availability of less restrictive means. Here, the less restrictive means must be the state's, including the county's, ability to tax and spread the burden amongst its

citizens rather than to place an unreasonable burden on non-resident attorneys.

3. Conclusion

Without considering the unconstitutional unlawfulness of the Contempt Proceedings, the Contempt Proceedings violates the law of New Mexico. The laws violated were that the: Contempt Proceedings were not initiated by a verified motion; Mr. Kleinsmith had no ability to comply with the order appointing him; Mr. Kleinsmith had no intent of violating the order appointing him; and; Judge Rich was not an impartial judge. Therefore, because of those violations of law, the Contempt order must be declared void by this court.

Secondly, the Collateral Bar Rule does not apply in the circumstances of this case.

The Contempt Proceedings and the Appointing Order are void because the Administrative Order is an unconstitutional usurpation of the exclusive right of the New Mexico Supreme Court to adopt or approve local rules. The usurpation includes the New Mexico Supreme Court's rules on the professional competency and undue hardship involved in aspirational pro bono work for lawyers. The Administrative Order was not approved by the New Mexico Supreme Court. The Administrative Order effectively orders attorneys to be competent in areas (i.e. here mental health) where the New Mexico Supreme Court has not so ordered. Finally, the Administrative Order effectively orders attorneys not residing in McKinley County to travel great distances (for Mr. Kleinsmith, 800 miles) and incur excessive expenses (travel & hotel) to perform pro bono work or to perform those duties in an incompetent

manner by phone. This violates the New Mexico Supreme Court's rules on aspirational pro bono work and professional competency. The Administrative Order is an unlawful unconstitutional order because it is a form of involuntary servitude abolished by the 13th Amendment to the Federal Constitution. Lastly, the Administrative Order is an unlawful unconstitutional order under the Federal Constitution for four other reasons. First, the absence of an impartial judge violates due process. Secondly, the treatment of district attorneys differently than other attorneys by burdensome secret rules of the Court Clerk are a denial of both equal protection and due process. If the Administrative Order is valid, for McKinley County it also violates equal protection by imposing duties on McKinley County attorneys that are not imposed on non-McKinley County attorneys. Thirdly, if McKinley County can legally have its Administrative Order so may every other New Mexico County. This imposes an unreasonable burden on the practice of law in interstate commerce. If this right to an "administrative" order were extended to every county in the country, the Administrative Order does not bear a substantial relationship to the State's (County's) objective when other less restrictive methods are considered – an unconstitutional effect on the Privileges and Immunities Clause.

In sum, the Contempt Proceedings violated New Mexico law setting forth the elements of contempt. Also, the basis of the Contempt Proceedings was the unconstitutional unlawful Administrative Order under both the United States Constitution and the New Mexico Constitution. Consequently, the Administrative Order must be declared unconstitutional and void. As the progeny of the unconstitutional Administrative Order, the Contempt Proceedings are also unconstitutional. They are also unlawful under New Mexico law.

The Administrative Order is unconstitutional. The Contempt Proceedings are unconstitutional and unlawful. Therefore, both must be decreed to be null, void and of no effect.

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Certificate of Service

I hereby certify that on the 12th day of September, 2003, I mailed, postage prepaid via the U.S. Postal Service, copies (as indicated below) of the foregoing *Appellant's Brief in Chief*, to the following addresses:

<u>Address</u>	<u>Original / Copies</u>
Clerk of Court New Mexico Court of Appeals 237 Don Gaspar Santa Fe, NM 87504	01 / 07
Attorney General of New Mexico 407 Galisteo Santa Fe, NM 87501 ATTN: Frank Weissbarth	00 / 01

/s/ Philip M. Kleinsmith

Court of Appeals
State of New Mexico

Case No. 23,999

In the Matter of
Philip M. Kleinsmith,
Respondent-Appellant

Appeal From McKinley County New Mexico,
Judge Joseph L. Rich presiding

Appellant's Brief in Reply

Submitted By: Kleinsmith and Associates, P.C.
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In its Answer Brief, the Assistant Attorney General makes the following arguments for which he cites authority:

Withdrawal; Appointment Authority; Professionalism; Collateral Bar; Preservation For Appeal; and Impartial Judge.

1. Withdrawal

In connection with his argument concerning withdrawal, the Assistant Attorney General argues that NMSA 32A-6-12(I) permits "meeting with the child, either telephonically or in person". This is his interpretation of this statute. The statutory words are only "meet with the child" to explain seventeen (17) separate rights to the child. Part (J) of the same statute requires the attorney to make at least two judgments and certify them to the court: (a) whether the child understands these seventeen (17) rights, and; (b) whether the child voluntarily and knowingly wants to remain a patient.

As stated, the Assistant Attorney General is of the opinion that these sensitive and far-reaching rights and judgments can be adequately done by phone. With all due respect, this conclusion has as much logic as the assertion that an adequately trained mental health specialist can determine competency by a phone conference with his patient. Common sense tells us that such an opinion is suspect because appearance, demeanor, physical reaction and characteristics are extremely important to such a value judgment. If anyone trained in those matters can only make such a judgment by a face-to-face interview, it stretches credulity that an attorney not trained in those matters (e.g. Mr. Kleinsmith) can make meaningful judgments in these matters. The assertion that a telephone interview satisfies the statute is simply wrong.

Secondly, the Assistant Attorney General argues that Mr. Kleinsmith's Appointment Response was a nullity because it was not denominated a Motion and Mr. Kleinsmith did not make sure an order appointing another attorney was entered. The first premise of this argument is that Mr. Kleinsmith had made an appearance. This is an unreasonable assumption because it is rooted in the notion that courts have the power to enter an appearance for an attorney against his will, a form of involuntary servitude. This is not true as demonstrated by Appellant's Brief in Chief (Part 2. d. thereof). The Assistant Attorney General's approach is formalistic and ritualistic. He rests his argument on the ritual of "motion" vs. "response". It is impossible to square such an argument with the overview of the procedural rules for children's court matters which proclaims that those rules:

"... be construed to serve simplicity in procedure (and) fairness in administration . . . " (Rule 10-101B, NMRA).

Despite this admonition, it is the Assistant Attorney General's argument that Judge Rich's clerks served fairness by being instructed ritualistically to ignore anything that did not bear the title "motion". This conclusion has as much validity as a court not even considering and striking a document not entitled "answer" in a civil case merely because it is called "response". Such a conclusion is untenable in a system whose purpose is justice and fairness.

Finally, Mr. Kleinsmith made the reasonable assumption that his Appointment Response would be considered and he denied that Mr. Bitsilly had contacted him (See p.7 below).

2. Appointment Authority

In this regard, it is first argued that because district courts have general jurisdiction (Article VI, Section 13, NM Constitution) and 32A-6-12I authorizes district court judges to appoint attorneys for the purposes discussed above. Therefore, district court judges have constitutional power to appoint attorneys for this purpose against their will. The argument has no more validity than arguing that because the U.S. Supreme Court has determined that certain criminal defendants are constitutionally entitled to an attorney, every judge in the United States has the power to appoint attorneys for this purpose against their will. The Assistant Attorney General cites no authority for his conclusion other than his *non-sequitur* conclusion from his premises. The reason no such authority is cited is because there is no authority. Instead, without exception, courts and governmental agencies have taken other avenues to fill the needs of criminals and other persons (e.g. mentally deficient persons, senior citizens, etc.), e.g.: public defenders, organizations created to meet these needs and voluntary pro bono work.

Second, it is argued that because Rule 16-602, NMRA, addresses the issues surrounding when a lawyer should decline to accept court appointments, courts, therefore, have the power to appoint lawyers involuntarily. That this rule addresses when a lawyer may decline an appointment, it recognizes that judges cannot involuntarily appoint lawyers. This conclusion is also invalid for the same reasons stated in the previous paragraph. Its invalidity is collaborated by Rule 16-601 NMRA's statement that lawyers should "aspire" to do a certain amount of pro bono work. "Aspire" cannot mean that lawyers can be

involuntarily compelled or required to do pro bono work. This later interpretation would be the only interpretation consistent with a right of courts to involuntarily compel a lawyer to perform legal services.

This argument could be carried to further ridiculous scenarios (e.g. compelled involuntary legal services are not pro bono legal services because they are compelled and involuntary). If reason and the historical record are to prevail neither the British nor American courts have ever recognized the power of the courts to involuntarily compel attorneys to perform legal services (*The Enigma of Lawyers Duty to Serve*, Shapiro, 55 NYU Law Review, 755 (1980)). There simply is no court power to involuntarily compel lawyers to perform legal services.

3. Professionalism

The last attempt to create this power is to seek support in what is called "Professional Conduct". First, he cites the revered Judge Cardozo's statement that being a lawyer "is a privilege burdened by conditions" (*In Re Rouss*, 221 NY 81, 116 N.E. 782, 783 (1917)). In further support, the case of *Schware v. Board of Bar Examiners*, 60 NM 304 291 P. 2d. 607 (1955) is also cited because it tangentially makes the same statement. Conveniently, the Assistant Attorney General does not cite any further to either of these authorities to fill-out those "conditions". The reason is that although that case-like 16-601, NMRA – urges voluntary free legal services, it does not stand for the principle that courts have the power to compel involuntarily a lawyer to perform legal services.

In this part of his Answer Brief, the Assistant Attorney General argues that because Mr. Kleinsmith was to be

paid for his services, all is well, i.e. legal. Is the issue now re-cast to say that compelled involuntary labor is legal if it is compensated? If the answer is "yes", that conclusion totally misses the point. Involuntary servitude – compensated or not – was outlawed by the 13th Amendment to the United States Constitution.

It is also argued that because the legal services were not repugnant to Mr. Kleinsmith, he had to perform. First, Mr. Kleinsmith's argument was that he was not competent to represent the child and that a two-day 600 mile trip was an unreasonable financial burden. Under Rule 16-602 NMRA these are valid reasons not to accept an appointment. The Assistant Attorney General's argument that an incompetent attorney must accept an appointment flatly contradicts Rule 16-101, NMRA's mandate that "A lawyer shall provide competent representation to a client."

Finally, under the banner of "professionalism", it is argued that because the "child..did not obtain . . . advice and representation", the child was damaged thereby. These assertions have no factual foundation in the record or otherwise. There absolutely is no evidence of any damage to the child. In fact, the evidence is to the contrary: another attorney was appointed and advised the child (See #15, p. 3 of Appellee's Answer Brief).

4. Collateral Bar

Appellant believes that his argument of this issue (Part 2 b of Appellant's Brief in Chief) is a better reasoned and stronger argument than Appellee's Argument of this issue. This is especially true when Appellee's statement that "Appellant had an adequate opportunity to challenge the Appointment of Counsel before this contempt proceeding

was initiated", is considered. This is totally non-sensical when it is considered that before the contempt hearing: no announcement to the Bar of the enactment of the Administrative Order was made; Judge Rich turned a deaf ear to all attempts to get him to disqualify himself, and; the Supreme Court denied prohibition.

5. Preservation for Appeal

Two cases are cited for the proposition that an appellant must assert the issue in the trial court and present the factual basis for the trial court to rule on the claim. Appellee claims that Appellant did not comply with this requirement on five issues raised by Appellant on appeal: Verified Motion; No Ability to Comply; No Intent to Violate; New Mexico Unconstitutionality, and; 13th Amendment Unconstitutionality. The factual and legal bases for these issues and all other issues appealed were raised in the following parts of the record: RP 12-20, 26-45 and Cassette Log 005-293, 1325ff. More specifically, in the Appointment Response, Contempt Response and Petition for Prohibition at the beginning and at the end of the Contempt Hearing these issues were raised, including their Federal and State bases. It must be noted that these facts included the following stipulation by the Assistant Attorney General:

"Judge Rich: All right, Mr. Kleinsmith

Philip Kleinsmith: I would incorporate what I have said previously. . . . and state I never received a call, either voice mail or otherwise, from the last witness (Mr. Bitsilly). And I would incorporate by reference. . . . both my response to the order appointing me and the Response to the

Order to Show Cause, plus the Amendments that I have stated.

Judge Rich: Mr. Jones, do you have any objections?

Michael Jones: No sir.

Judge Rich: And if you would . . . recite those items you wish to be entered as exhibits, Mr. Kleinsmith.

Philip Kleinsmith: Response to Order to Show Cause . . . Motion to Disqualify . . . Response to Appointment of Counsel.

Judge Rich: All right."

The Assistant Attorney General seems to contend that none of the Appellant's constitutional issues were sustained by factual evidence at the Contempt Hearing. First, this is untrue for the reasons stated in the previous paragraph. Secondly, Judge Rich and the Assistant Attorney General have conceded throughout these proceedings that the Administrative Order was not approved by the New Mexico Supreme Court. Thirdly, how do you prove the negative that the Administrative Rule was not approved by the New Mexico Supreme Court other than asserting it and Judge Rich and the Assistant Attorney General never proving anything else? These assertions are that Appellant must prove a negative when, he has the ability to easily prove the opposite, to-wit: the Administrative Order was so approved, His ability to easily prove this fact which he adamantly refuses to do, speaks reams about the factual roots of this case.

The factual bases of the 13th Amendment Unconstitutionality and other constitutional arguments are much the

same. Their factual bases is part of and between every line of the transcript of these proceedings and all its writings.

Of particular note is the Assistant Attorney General's footnote (p. 15, footnote 8) where he incorrectly attempts to leave the impression that the federal court's have the power to force lawyers to work involuntarily citing *Mallard v. United States*, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed 318 2nd (1989). A reading of Appellant's Brief in Chief and the case itself demonstrates Appellee's misstatement.

Finally, the Assistant Attorney General's footnote arguments (Footnote 9, page 16) are more valid for Mr. Kleinsmith. There is nothing more fundamental than constitutional rights. Therefore, assuming without agreeing that these issues have not been correctly preserved for appeal, it is correct for this court to excuse strict compliance to correct a miscarriage of substantial justice. Moreover, Appellant being found in contempt, does shock the conscience (See citations in that footnote).

6. Impartial Judge

Appellee asserts that Judge Rich could preside over the Contempt Hearing because he was not personally embroiled to an extent that he could not make a fair and objective decision and Mr. Kleinsmith had made no personal insults of Judge Rich. In support thereof, three cases are cited: *In Re Avallone*, 91 N.M. 777, 581 P.2d 870 (N.M. Sp. Ct. 1978); *In Re Byrnes*, 132 N.M. 718, 54 P3d 996 (N.M. Sp. Ct 2002) and *Dawley v. LaPuerta Archetectual Antiques*, 2003 - NMCA - 029, ___ N.M. ___, 62 P.3 1271 (N.M. Ct of App. 2002).

First *Dawley* and *Avallone* are truly distinguishable and, therefore, not relevant. This case is an alleged indirect or nonsummary criminal contempt concerning orders of Judge Rich which Mr. Kleinsmith allegedly did not obey out of the presence of Judge Rich. *Dawley* (See page 1280, NM pagination not available) was a case of alleged personal partiality of a trial judge in a civil case at which he had presided. *Avallone* (See pages 778 and 871 respectively) was an alleged direct or summary criminal contempt by an attorney concerning orders of the New Mexico Court of Appeals.

Finally, *Byrnes* is also truly distinguishable and, therefore, not relevant. It (See pp 999-1002, 1006, NM pagination not available) was a direct or summary contempt hearing by an attorney of a trial court judge in which the attorney allegedly disobeyed a trial judge's order in the presence of the trial judge. The case also involved suspension of the attorney from practicing before the trial judge. It is in this later context, a "suspension hearing", that the New Mexico Supreme Court stated that the rule concerning judicial personal involvement when personal insults were made by the alleged condemnor. Even in the context of a "suspension hearing", the New Mexico Supreme Court did not adopt this rule "whole cloth" (See page p. 1007, NM pagination not available). The important point is that whatever the rule may be about judicial disqualification in "suspension proceeding", the same rule does not prevail in indirect non-summary criminal contempt proceedings (See next paragraph). A final note must be made before proceeding to the applicable rule. In *Byrnes* (op. cit.), the case of *Purpura v. Purpura*, 115 N.M. 80, 1247 P 2d 314 (1993, NM Ct. of App.) is cited by the

court. It must be noted that case is inapposite here because it involved a direct or summary criminal contempt.

The only New Mexico case on indirect or nonsummary criminal contempt is *Wollen v. State*, 66 N.M., 1,2, 578 P 2d 960, 961 (1974 NM Sp Ct.).

"In *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S. Ct 499, 27 L. Ed 2d 532 (1971), it was determined that when a judge becomes embroiled to the point where it is unlikely that he can maintain the calm detachment necessary for fair adjudication, then he should be prohibited from rendering the contempt judgment. The problem with such a rule is that the personalities and temperments of judges vary considerably from judge to judge and what might "embroil" one judge might not so affect another. The sound administration of justice should not allow for such an arbitrary standard. Would it not be much easier, as well as more just, to provide a standard rule whereby the determination of personal embroilment on a case-by-case basis is no longer necessary? The Court of Appeals of Michigan thought so, and in the case of *People v. Kunz*, 35 Mich App. 643, 660, 192 N.W. 2d 594, 603 (1971) concluded that:

'... in the absence of circumstances necessitating immediate corrective action (i.e. summary contempt proceedings), a person accused of contempt by the trial judge should be tried before a different judge, one not involved in the subject matter of the contempt or in the citation of the condemnor.'

We agree that this result is the one which most adequately provides for the fair administration of

justice and one which no longer necessitates the painstaking evaluation of whether a judge has become embroiled or lost his objectivity. The cause is therefore reversed. . . ."

How refreshing and clear are these words of Chief Justice McManus speaking for a unanimous New Mexico Supreme Court. There can be no doubt that under this law, Judge Rich was not allowed to initiate and to preside at this Contempt Hearing and, because of that alone, the Contempt Order must be reversed.

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by /s/ [Illegible]

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In the Supreme Court of the
State of New Mexico

In the matter of Philip M. Kleinsmith,
Respondent-Appellant

Petition for
Writ of Certiorari

Respondent-Appellant petitions this Court to issue its Writ of Certiorari to the New Mexico Court of Appeals concerning the attached Memorandum Opinion. Specifically, it is shown:

1. Date of Opinion. The Memorandum Opinion is dated February 4, 2005.

2. Questions Presented for Review.

(a) First issue: Were the required elements of contempt proven?

(b) Second Issue. Does the Collateral Bar Rule preclude Mr. Kleinsmith from challenging the underlying Administrative Order?

(c) Third Issue. Are the Appointment Order, the Contempt Proceedings and Contempt Order illegal and void because the Administrative Order is unconstitutional under Article VI, Section 3, of the New Mexico Constitution and the 13th Amendment to the U.S. Constitution?

(d) Fourth Issue. Is the same thing true because the Administrative Order is unconstitutional under the following provisions of the U.S. Constitution: Due Process and Equal Protection (14th Amendment); Interstate Commerce (Article I, § 8) and Privileges and Immunities (Article IV § 2(i) and 14th Amendment)?

(e) Fifth Issue. Were these constitutional issues preserved and made before and during the Contempt Proceedings?

3. Material Facts. Without any known notice to the attorneys to be affected thereby and without the approval of the New Mexico Supreme Court apparently the Trial Court and all of its judges (i.e. judges of 11th Judicial District) on October 23, 2002, adopted the Administrative Order. "Apparently", because it does not state who approved or disapproved it. It is only signed by Judge Rich. It states its purpose to be "... to develop an effective and fair system for pro bond appointments ..."

"5. Given statutory restrictions and obligations of the District Attorney's Office of the Eleventh Judicial District, Division II, special consideration must be given to how attorneys in that office will fulfill their pro bono obligations."

As to the exempted District Attorneys, it provides:

"The District Attorney should meet annually with the McKinley County District Court judges to discuss how lawyers in the District Attorneys Office will fulfill their pro bono obligation."

The Administrative Order provides no similar alternative for lawyers who wish to fulfill their alleged pro bono obligations in other ways (e.g. charitable contribution) as apparently district attorneys may do.

The Administrative Order prescribes that *any* attorney or law firm who is involved in more than two cases in any twelve months in the McKinley County Courts shall be appointed on a rotating basis "... where appointment of counsel is deemed necessary by the court, ...". The

Administrative Order makes no provisions on how an attorney can be excused from a particular appointment.

The Respondent is an attorney whose practice is limited to real estate foreclosures and related matters in twenty-four states where he is licensed. This includes filing more than two foreclosures per year in more than ten New Mexico counties per year. The same is true in many other states. He has not practiced in the mental health area for over ten years. He does not wish to practice in that area. Respondent's only residence and only office are in Colorado Springs, Colorado, at least 300 miles from Gallup, New Mexico, the location of the 11th Judicial District Court.

On December 18, 2002, Judge Rich signed the Appointment Order (RP 14) wherein he, pursuant to Child Mental Health Statute, 32A-6-12G, I & J NMSA, and the Administrative Order appointed Mr. Kleinsmith to fulfill certain statutory duties pursuant to that statute. Those statutes direct that the appointed attorney meet with the child, advise the child of certain legal rights, and make a report to the Court concerning the child's competency. Those statutes do not state that an attorney can be appointed against his will.

The Appointment Order was faxed to Mr. Kleinsmith and received. Within hours Mr. Kleinsmith called the Court Clerk concerning his appointment. He explained that he was scheduled to leave on vacation the next day; he would not return until December 24, 2002, and he could not fulfill the court order. A conversation ensued about how to get the Court to appoint someone else. The Clerk testified that it should be by a "Motion to Withdraw and Order".

That same day Mr. Kleinsmith filed his Appointment Response wherein he explained what is described above and stated "Mr. Kleinsmith requests the Court to appoint someone else." This Appointment Response was faxed and filed with the Court.

Mr. Kleinsmith went on his vacation, believing that because of his Appointment Response another attorney would be appointed (RP 15). According to the Court Clerk, the filing clerks were trained to only bring a Motion to Appoint a Substitute Attorney to her attention. Consequently, the Appointment Response was not brought to her attention and another attorney was not appointed.

The Clerk's testimony was:

"PHILIP KLEINSMITH: Excuse me, um I forget the Exhibit number but its the response to appointment of counsel. Do you have that before you?

MISS PALACHEK: Yes Sir, state's Exhibit 1.

PHILIP KLEINSMITH: Ok. Ah does it say in the final sentence of that paragraph, "Mr. Kleinsmith requests the court to appoint someone else"?

MISS PALACHEK: Yes.

PHILIP KLEINSMITH: Does it not explain that I would be absent from the 19th thru the 24th?

MISS PALACHEK: It does.

PHILIP KLEINSMITH: I'm sorry.

MISS PALACHEK: It does say that yes.

PHILIP KLEINSMITH: Ok so in substance would you agree that this is as you call it a motion to be excused or whatever terminology you wish to use?

MISS PALACHEK: Uh, I would not and neither would the docket clerk. I did not see this document. When it was filed, the docket clerk docketed it and they are not taught to send up responses, that's not considered something the judge would see, they send up motions.

PHILIP KLEINSMITH: So you're saying this whole thing has come about because the wrong label was used?

MISS PALACHEK: Well its not a motion and that's what we are accustomed to. . . .

PHILIP KLEINSMITH: Is that ma'am I asked you whether or not this whole thing had come about because an improper label was affixed to something.

MISS PALACHEK: No I believe . . . because an order was not entered excusing you from . . .

PHILIP KLEINSMITH: I didn't ask you that.

PHILIP KLEINSMITH: Your Honor I ask the Court to direct the witness to answer the question. And the question is: Is not the response ask for someone else to be appointed?

MISS PALACHEK: Yes it does.

PHILIP KLEINSMITH: And because the label, Motion to Appoint somebody else or whatever you wished was not used that has precipitated the course of events? Is that correct?

MISS PALACHEK: No that is not correct it's not the label I wish, Sir it's what's customarily filed in this court.

PHILIP KLEINSMITH: I didn't ask you ma'am what you want your . . .

MISS PALACHEK: My answer is No Mr. Kleinsmith. The answer is No.

PHILIP KLEINSMITH: But do you agree that a response to appoint someone else is contained within that response?

MISS PALACHEK: Yes.

After two or three calls to the Court Clerk by the institution at which the child was housed that no attorney had advised the child, the Court Clerk appointed another attorney who did advise the child.

Again, not being aware of the Appointment Response, the Clerk on January 22, 2003 prepared the Contempt Citation. Judge Rich signed it and it was faxed and received by Mr. Kleinsmith.

On January 29, 2003 Mr. Kleinsmith filed his Contempt Response to the Contempt Citation alleging he was not in contempt for the reasons stated above and that the Administrative Order and the Appointment Order forced him to practice in areas of law in which he was not competent. By attaching the Petition for Prohibition, it also alleged that these orders were unconstitutional under New Mexico Constitutional provisions under which only the New Mexico Supreme Court had the power to regulate inferior courts and attorneys. It also alleged that these orders were unconstitutional under the United States

Constitution as violations of the prohibition against involuntary servitude.

At the same time, Mr. Kleinsmith filed a Petition for Prohibition alleging these same grounds to the New Mexico Supreme Court. On February 10, 2003 that petition was denied without comment.

At the March 19, 2003, hearing, the constitutional bases of equal protection, due process, interstate commerce and privileges and immunities were added. The right to have this matter heard by an impartial judge was also urged and that Judge Rich should disqualify himself was asserted. The Contempt Response also requested that Judge Rich and all judges of his district be disqualified as not being impartial judges because those judges, particularly, Judge Rich, created the Administrative Order and, therefore, as its proponents were Mr. Kleinsmith's adversary. Specifically, these judges, especially Judge Rich, were the partial advocates of the Administrative Order, the Appointment Order and the Contempt Order. That Judge Rich was acting as both judge and advocate is demonstrated by he and his attorney's attempts to compromise the matter.

On March 19, 2003, the Contempt Hearing was held. At the outset, Mr. Kleinsmith renewed all of his objections to the proceedings. Without ruling on these objections, the hearing proceeded. At the conclusion, Judge Rich ordered each attorney to prepare proposed Findings of Fact, Conclusions of Law and Judgment. In his proposed Findings of Fact, etc., Mr. Kleinsmith extensively set out all grounds, constitutional and otherwise, to not find contempt.

On April 15, 2003, Judge Rich found Respondent in contempt and fined him \$500.00. He signed the New Mexico Attorney General's Finding of Fact, etc.

4. Bases for Writ. (a) The Memorandum Opinion (p. 7) adopts this Supreme Court's ruling in *State v. Stout*, 100 NM 472, 475, 672 P2d 645, 647 that a judge involved in an indirect contempt cannot preside at a hearing thereon when "one of his staff will necessarily be a witness in the proceeding". Here, a clerk to Judge Rich was a witness.

(b) The Memorandum Opinion (p.7) states that "Appellant may not violate and simultaneously attack the Court's appointment order". This conflicts with the Court of Appeals following rulings:

"Defendant either had to appeal, seek expedited judicial redress or accept the order of the court . . . ". "This affirmance should not, however, be misconstrued as granting undue judicial license in the area of contempt. Courts and commentators have questioned the outer limits of the collateral bar rule. For example, when fundamental constitutional liberties are subject to immediate and irreparable harm, or where alternative avenues of judicial redress are simply not available given the press of time, the collateral bar rule may have to yield. (*State v. Bailey*, 118 N.M. 466, 469, 882 P. 2d 57, 60 (NM App 1994)."

"Further, the collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling; in the absence of such an opportunity for review, the [alleged] contemnor may challenge the validity of the disobeyed order "on appeal" (*Pina v. Espinoza*, 130

N.M. 661, 669, 29 P. 3rd 1062, 1070 (N.M. App. 2001).

(c) Issues 2(a), 2(b), 2(c) and 2(d) above are significant questions of law under the cited provisions of the U.S. Constitution and the New Mexico Constitution.

(d) All of the issues stated in 2 above are of substantial public interest which should be decided by this Supreme Court.

5. Direct and Concise Arguments.

(a) Argument of First Issue

The contempt was not initiated by a verified motion. Mr. Kleinsmith had no intent to violate Judge Rich's Appointment Order nor did he have the ability to comply with it. Mr. Kleinsmith lived more than 300 miles from Judge Rich's court; was slated to take a scheduled vacation; in good faith and with no intent to violate Judge Rich's order, filed a written motion to be excused in compliance with a court clerk's instructions which were misunderstood by the clerk and not brought to Judge Rich's attention, and; did not have the professional skills to fulfill the duties imposed by Judge Rich. Fourthly, by presiding at the Contempt Hearing at which his clerk testified, Judge Rich violated New Mexico's rule for a constitutional impartial judge (*State v. Stout*, op. cit). Fifthly, Mr. Kleinsmith did not violate a lawful order (See (c), (d) & (e) immediately below). For these reasons, the Contempt Order is illegal and void.

(b) Argument of Second Issue. The quoted material in 4(b) above states that when "fundamental constitutional liberties are subject to immediate and irreparable harm, or

where alternative avenues of judicial redress are simply not available given the press of time, the collateral bar rule may have to yield". Here, the unconstitutional Administrative Order had been adopted unbeknownst to Mr. Kleinsmith only 60 days before Judge Rich used it as the Appointment Order of Mr. Kleinsmith. The alternative avenue of judicial redress, a writ of prohibition was sought by Mr. Kleinsmith but denied him. Mr. Kleinsmith's fundamental constitutional liberties were subject to immediate and irreparable harm.

For these reasons, the Collateral Bar Rule was not applicable.

(c) Argument of Third Issue. This provision vests in this Supreme Court the exclusive supervisory authority over inferior courts like Judge Rich. Rule 1-083 of the Supreme Court requires local rules like the Administrative Order to be approved by this Supreme Court. It was not so approved.

As a further extension of this exclusive supervisory power, this Supreme Court has directed that attorneys competently represent their clients and *aspire* to do pro bono work. Nowhere does this Court claim the power of itself or any inferior court to involuntarily compel attorneys to represent any person. Such power is not part of the common law nor an exception to the 13th Amendment to the U.S. Constitution.

Judge Rich's Administrative Order, his Appointment Order of Mr. Kleinsmith and the entire Contempt Proceeding and Contempt Order violated all of these constitutional rules and are void.

(d) Argument of Fourth Issue. If every district court in New Mexico adopted an "administrative rule", any

attorney whose practice involves many districts would be caught in a web of unending pro bono work while an attorney who practiced in only one district would not. Projecting this for an attorney who has a multistate practice the web swallows him. The Administrative Order has these repercussions. It is irrational in that it excuses district attorneys and has no means for a private attorney to be excused. It treats attorneys differently only because an attorney practices in multiple districts. It is a denial of substantive due process and equal protection. It unreasonably burdens attorneys engaged in interstate commerce and violates such attorneys' rights under the privileges and immunities clause to be treated the same as attorneys who only have a one-district practice. The Administrative Order is unconstitutional.

(e) Argument of Fifth Issue. The record clearly shows that this was done, Judge Rich ignored them and proceeded without ruling on them. The Memorandum Opinion persists in this by declaring what is in the record is not in the record.

6. Prayer. Mr. Kleinsmith requests that the Court of Appeals Memorandum Opinion be reversed.

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Certificate of Service

I hereby certify that on the 14th day of February, 2005, I mailed, postage prepaid via Federal Express, copies (as indicated below) of the foregoing Petition for Writ of Certiorari, to the following addressees:

<u>Address</u>	Original / Copies
Clerk of Court New Mexico Supreme Ct. 237 Don Gaspar Santa Fe, NM 87504	01 / 07
Attorney General of New Mexico 407 Galisteo Santa Fe, NM 87501 ATTN: Frank Weissbarth	00 / 01

/s/ Philip M. Kleinsmith
